Supreme Court, U.S.
FILED

94-1725 APR 19 1995

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CRANE CO.,
Petitioner,

v.

UNITED STATES OF AMERICA EX REL. STANLEY RABUSHKA
and STANLEY RABUSHKA,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns the limits of subject matter jurisdiction under the special jurisdictional provisions of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A). Respondent brought a *qui tam* action against Petitioner Crane Co. (or "Crane") under the False Claims Act (or "FCA") alleging that Crane divested its subsidiary, CF&I Steel Corporation ("CF&I"), in a fraudulent scheme to cause the Pension Benefit Guaranty Corporation ("PBGC") to assume CF&I's unfunded pension liability. The district court dismissed the case for lack of subject matter jurisdiction under §3730(e)(4)(A) finding that Respondent's suit was based solely on prior public disclosures of Crane's alleged scheme. A divided panel of the Eighth Circuit reversed the district court. The appellate court, departing from established standards of review, rejected the jurisdictional facts found by the district court and concluded that jurisdiction existed because Respondent's allegations had not been the subject of prior public disclosures.

The questions presented are:

I

Does a district court have subject matter jurisdiction under §3730(e)(4)(A) of the False Claims Act over a *qui tam* suit based on public disclosures that so alerted the PBGC to the likelihood of a false claim, that it began an investigation, even though the public disclosures did not mention fraud explicitly?

II

Are findings of fact of a district court supporting its conclusion that subject matter jurisdiction is lacking subject to review by other than the clearly erroneous standard established in *Anderson v. City of Bessemer City*?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of this petition identifies all parties in the lower court. Petitioner Crane Co. has no parent corporation. Crane has only wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Crane Co. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 40 F.3d 1509 (8th Cir. 1994). It is reprinted in the Appendix ("App.") at 1A-40A. The district court's unpublished opinion and order is reprinted at App. 41B-49B. The court of appeals' order denying Crane's petition for rehearing is not reported and is reprinted at App. 50C.

JURISDICTION

The court of appeals entered its judgment on November 16, 1994. It denied a timely petition for rehearing on January 19, 1995. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statute involved is 31 U.S.C. §3730(e)(4)(A). It is reprinted at App. 51D.

STATEMENT OF THE CASE

In 1985, Crane distributed its ownership interest of CF&I to Crane shareholders as a dividend. More than five years later, on November 7, 1990, CF&I declared bankruptcy due in part to its inability to fund the required annual payments to its pension plan. At the time of its bankruptcy, CF&I had unfunded pension obligations estimated at $140 million. In 1992, following lengthy negotiations with CF&I, the PBGC terminated CF&I's pension plan, thereby triggering the PBGC's statutory obligation to pay covered benefits to CF&I retirees.

Before Respondent Rabushka commenced this suit on February 28, 1991 and beginning as early as 1985, *The Pueblo Star-Journal* and *The Pueblo Chieftain*, newspapers in Pueblo, Colorado, where CF&I's steel mill and most of its employees are located, publicized the underfunding of CF&I's pension plan and Crane's plans for CF&I. Specifically, *The Pueblo Star-Journal* and *Pueblo Chieftain* on May19, 1985 reported:

> One of the concerns that workers, and potential investors, have had is [CF&I's] pension liability, a major cost that no longer will be the responsibility of the much larger Crane Co.

Shortly after Crane's spin-out of CF&I, the media disclosed that Crane's April 3, 1985 pre-spin-out Proxy Statement re-

ported a substantially lower unfunded pension liability for CF&I's pension plan than reported in CF&I's 1986 post-spin-out annual report.

When CF&I filed for bankruptcy, the *Pueblo Chieftain* reported as follows on November 8, 1990:

> CF&I listed $221.6 million in assets against $332.1 million in liabilities, as of a July 31, [1990] financial statement accompanying the bankruptcy petition.
>
> By far the biggest liability is a $140 million underfunding of the pension plan, which CF&I will seek to unload during reorganization.
>
> * * *
>
> The 1982-83 shutdown of CF&I's blast furnaces and coke ovens, ..."created a tremendous number of new retirees now close to 8,000 people receiving pensions."
>
> Before Crane spun CF&I off as an independent company in 1985, the company ordered an actuarial study that showed the pension bill was $19 million a year, triple the previously estimated $6 million.

Furthermore, during a CF&I bankruptcy hearing on December 14, 1990 attended by the PBGC and other creditors, Frank Cummings, counsel for CF&I, stated:

> In addition, there were what we believe to be miscalculations, putting the kindest possible face on it, by the actuary for this plan who was retained by the former parent of the company, Crane. And those miscalculations — it is a pejorative term. Those calculations which did not display what we believe should have been displayed were not discovered until at or about the time of the spin-off which occurred in 1985.

Later in the same bankruptcy proceeding, Crocker Nevin, Chairman of the Board of CF&I, explained:

> The blow came really late in '86 when thanks to very substantial give backs by the union and by the management we were able to save $24 million. We were then presented with the new actuarial findings which showed that our unfunded [pension liability] was around $140 million and our annual [pension contribution] of $17 million was [increased to] $19 million.

From this and other evidence, the district court found that the "significant transactions which underlie Respondent's FCA claim were disclosed in the media prior to Respondent's filing of this suit." App. at 46B. The district court also found that Frank Cummings, counsel for CF&I, essentially made an allegation of actual fraud during CF&I's bankruptcy proceedings. App. at 47B.

In addition to these disclosures mentioned specifically by the district court, the record below contains evidence of other disclosures preceding Respondent's suit. For example: (i) in 1985, the Securities Exchange Commission ("SEC") explored Crane's desire to avoid liability for CF&I's pension obligation during the course of an unrelated investigation of suspected insider trading;[1] (ii) by 1990, the news media reported CF&I and PBGC to be negotiating the termination of the CF&I pension plan; (iii) CF&I declared bankruptcy because of its inability to avoid its underfunded pension obligations; (iv) the cause of this substantial underfunding was explored extensively in the bank-

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[1] These depositions are "public", as defined by the Act because they are part of a criminal, civil or administrative hearing. They are also public in a practical sense because, after the conclusion of an SEC investigation, such transcripts are available via a Freedom of Information Act request. In this case, the SEC investigation terminated in 1986 and, from that date forward, the transcripts were actually available to the public.

ruptcy court. Most importantly, the PBGC began investigating Crane's potential liability for CF&I's pension plan obligations prior to the time Respondent filed his first complaint.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Respondent brought two actions against Crane and its former subsidiary, CF&I, under the False Claims Act ("FCA" or the "Act"), 31 U.S.C. §§3729-31.[2] Respondent's initial suit, filed February 28, 1991, was dismissed by the district court as premature. Respondent appealed. During the pendency of the appeal, the matter ripened when the PBGC terminated CF&I's pension plan and assumed responsibility for the insured portion of CF&I's unfunded pension liability. Before the Eighth Circuit remanded, Respondent filed on March 20, 1992 a second complaint that included the additional allegations concerning the actions of the PBGC. The district court consolidated these cases.

The United States did not intervene as permitted by 31 U.S.C. §3730. Crane moved to dismiss for lack of subject matter jurisdiction under 31 U.S.C. §3730(e)(4)(A) because the complaint was based on allegations and transactions that were publicly disclosed in the news media and in bankruptcy proceedings. The district court granted Crane's motion, dismissing Respondent's claim. Respondent sought reconsideration of the district court's order and also sought to amend his complaint. The proposed amendment did not allege any additional facts from which the district court could find jurisdiction under §3730. The district court denied both motions and Respondent appealed to the Eighth Circuit.

The court of appeals reversed the district court, finding that the publicly disclosed information was not sufficient to invoke the

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[2] CF&I is in bankruptcy under Chapter 11 of the Bankruptcy Code and, therefore, was not served with process.

jurisdictional bar provisions of the False Claims Act because the publicly disclosed transactions or allegations "do not encompass the essential element of the fraud alleged in Respondent's complaint." App. at 9A. In his dissenting opinion, Judge Magill agreed with the district court and wrote that the majority opinion "frustrates the intent of Congress and ignores the lessons of history by opening wide the floodgates for the very 'second toots' and parasitic lawsuits that Congress sought to prevent" by the jurisdictional bar provision, 31 U.S.C § 3730 (e)(4)(A). App. at 9A. Judge Magill further argued that the majority had seriously misapplied and misconstrued the principal case relied on by the majority, *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). Nevertheless, Crane's requests for rehearing and for rehearing en banc were denied.

REASONS FOR GRANTING THE WRIT

In direct conflict with five other circuits, the Eighth Circuit has found subject matter jurisdiction of a *qui tam* suit where ample public information existed to alert the PBGC to the likelihood of the false claim alleged. The Eighth Circuit came to this conclusion by ignoring this Court's decision in *Anderson v. City of Bessemer City* and apparently reviewing *de novo* the district court's findings of fact as to its lack of jurisdiction. *Bessemer City* requires that appellate courts make that review using the clearly erroneous standard.

If not reviewed and reversed by this Court, the Eighth Circuit's decision will open the federal courts to anyone alleging a false claim unless public disclosures exist that reveal fraud so patent that no innocent interpretation is plausible. Broadening *qui tam* jurisdiction in this fashion will frustrate Congressional efforts to limit private FCA actions to those brought by true "whistleblowers."[3]

I. The Eighth Circuit's Interpretation Of §3730(e)(4)(A) Conflicts With Five Other Courts of Appeals

The court of appeals adopted what it understood to be the reasoning of *United States ex rel. Springfield Terminal Ry v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). That understanding led to the conclusion that §3730(e)(4)(A) did not bar Respondent from bringing this action because "the essential elements comprising that fraudulent transaction [had not] been publicly disclosed so as to raise a reasonable inference of fraud." App. at 8A. In so holding, the Eighth Circuit:

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[3] A "whistleblower" is, in the words of *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992), one who "sounds the alarm," not one who "republishes an allegation that already has been publicly disclosed."

- erroneously extended *Springfield* by limiting application of the public disclosure bar to circumstances in which either (i) the public allegation is one of "fraud" in *haec verba*, or (ii) the publicly disclosed facts, from which an inference of fraud may be drawn, are not susceptible of any innocent explanation; and

- selectively analyzed the facts in the record by ignoring the public disclosures, including a bankruptcy proceeding to which the PBGC was a party, that in the aggregate placed the PBGC on actual notice of a potential false claim and caused the PBGC to initiate an investigation;

In a thorough dissent ("Dissent"), Judge Magill fully analyzed how the Eighth Circuit misinterpreted the FCA and misapplied *Springfield* in this case. The panel's opinion plainly conflicts with the jurisdictional limits of the FCA established by *Springfield* and the well-reasoned decisions of the Second[4], Third[5], Ninth[6] and Tenth[7] Circuits. As articulated in those cases, only bona fide whistleblowers meet the jurisdictional requirements to prosecute *qui tam* actions, while "second toots" who allege facts

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[4] *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992)(*qui tam* suit barred when based on allegations disclosed during government investigation).

[5] *United States ex rel. Stinson v. Prudential Insurance Co.*, 944 F.2d 1149 (3rd Cir. 1991)(law firm's *qui tam* suit barred when based on information gained in discovery).

[6] *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992)(*qui tam* suit barred if relator has no hand in the public disclosure of the allegations).

[7] *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 1364 (*qui tam* suit barred when based on allegations disclosed in civil suit, Senate hearings, and news reports).

or make allegations cumulative to those already publicly disclosed are barred.[8]

Although the panel below may have sought to follow *Springfield*, its holding goes far beyond that of the District of Columbia Circuit. As the Dissent demonstrates, the majority opinion devitalizes the public disclosure bar to a point where few, if any, *qui tam* actions are barred.

In *Springfield*, in contrast to the facts in this case, the public disclosures pointed only to innocent activity. They provided no clue of potential false claims and no basis for government investigative activity. Only the whistleblower's information revealed the potential false claim.

Here, the district court found that the essential facts of the false claims being alleged were sufficiently disclosed in newspapers and court proceedings so that no jurisdiction existed by virtue of the restriction of §3730(e)(4)(A). App. at 47B. The appellate panel undermined those trial court findings by postulating alternative explanations consistent with innocent activity. Since it could infer an innocent explanation from those publicly disclosed facts, the panel concluded that an "uninitiated reader" was not alerted to potential fraud. App. at 8A. That finding extended *Springfield* well beyond its holding and severely distorted the application of the public disclosure bar in future cases. If public disclosures of fraud must unequivocally disclose fraud to the uninitiated before the public disclosure bar applies, then the provisions of §3730(e)(4)(A) will fall into disuse. An "uninitiated reader" will almost certainly find facts relevant to potential fraud

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[8] The First and Fourth circuits have a contrary interpretation of §3730(e)(4)(A). *See United States ex rel. Prawer v. Fleet Bank*, 24 F.3d 320 (1st Cir. 1994) (*qui tam* suit not barred if it provides an appropriate return to the government); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir.), *cert. denied*, 115 S.Ct. 316 (1994) (*qui tam* suit not barred unless it is derived from a previous disclosure).

to be either meaningless or subject to innocent, though implausible, explanations.[9]

The purpose of the public disclosure bar is not as the appellate court holds, to bar only those suits where the disclosed fraud is apparent to the "uninitiated." App. at 8A. Section 3730(e)(4)(A) denies jurisdiction to FCA actions based on publicly disclosed information that is sufficient to warrant an investigation into potential fraud. *Springfield*, 14 F.3d at 1520. Much fraud against the government is factually complex and, even if fully disclosed, would not necessarily reveal itself to a layman. In such complex cases, the appellate court's holding would render the public disclosure bar completely inoperative.

The presence in the public record of facts which may have innocent explanations does not render a trial court finding of disclosure of fraud clearly erroneous. An inquiry notice standard is consistent with the disclosure of equivocal information. Under this criterion, the critical element is that the public revelations provide notice of potential fraud, not whether the revelations are unexplainable or point only in the direction of liability.

The public disclosures in this case may have innocent explanations, as the court of appeals points out. The record before the district court, however, reveals not only the two conflicting "states of fact" required by *Springfield* but also both a possible motive for Crane along with an opportunity to act.[10] While these disclosures do not establish wrongdoing by Crane, they are certainly adequate to put the PBGC on notice of the need for an

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[9] Ironically, under the appellate court's interpretation, the more flagrant its fraud and the more bereft of innocent explanations for its conduct, the more likely a defendant is to escape a *qui tam* action if even minimal disclosures occur. The honest defendant, however, saddled with innocent or equivocal disclosures, will be forced to defend the action.

[10] This case is not yet at issue. If answer should ever be required, Crane will deny any fraudulent activity.

investigation. That these disclosures were adequate for the purpose is conclusively evidenced by the fact the PBGC's investigation was already underway when Respondent filed suit. App. at 31A.

As the Dissent points out in extensive quotes from the media, the testimony in an SEC investigation and proceedings in bankruptcy court, the public disclosures lay out all the elements of the fraud alleged by Respondent. App. at 31A. These disclosures were not lost on the PBGC, which possesses a far greater sophistication than the uninitiated general public in matters relating to pension funds. The PBGC had adequate notice of Crane's widely publicized conduct long before Respondent's first FCA claim and initiated its own investigation. This is not the circumstance in which Congress intended a *qui tam* plaintiff to proceed.

Since its enactment in 1863, the FCA has barred a *qui tam* action whenever the government had prior inquiry notice of the potential fraud. *See Pettis ex rel. United States v. Morrison-Knudson Co.*, 577 F.2d 668 (9th Cir. 1978). Although the FCA was amended in 1986, those amendments did not change the scope of the inquiry notice bar. Rather, the 1986 amendments rectified the injustice represented by *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984). In *Dean*, a whistleblower was barred by its own act of reporting fraud to the government. To remedy this unfair result, Congress broadened FCA jurisdiction by carving out a safe harbor for the "original source" of information about potential fraud. 31 U.S.C. §3730 (e)(4)(B). Simultaneously, it restricted jurisdiction by barring suits (other than by original sources) whenever the government was on constructive inquiry notice of possible fraud as the result of a "public disclosure." 31 U.S.C. §3730 (e)(4)(A).

As the Dissent points out, these changes did nothing to abrogate the inquiry notice standard established by *Pettis*. In

fact, *Springfield* itself acknowledges the vitality of this criterion. 14 F.3d at 655-56.

The Eighth Circuit's opinion seems to be based on a policy of encouraging greater private prosecution of potential government fraud. The legislative history demonstrates that this zeal for expanded litigation under the FCA is misplaced. Congress debated in 1943 and again in 1986 the competing policies of ferreting out government fraud and discouraging "parasitic" suits. In each instance, Congress elected to constrain *qui tam* jurisdiction.[11] S. REP. No. 345, 99th Cong., 2d Sess. at p. 11, 30 *reprinted in* 1986 U.S.C.C.A.N. 5276, 5295.

The powerful enforcement arms of today's government do not require the 10,000 attorneys general envisioned by the Lincoln administration. *Id.* at p. 11. Today's government needs whistleblowers to break "the conspiracy of silence" surrounding undisclosed fraud. *Id.* at p. 11. This case does not present such a conspiracy of silence. Where the clear possibility of false claims is publicly disclosed, the government can investigate. In that event, the *qui tam* plaintiff may hinder more than help.

The Court should clarify the purpose of the FCA and resolve the conflict among the circuits about the scope of §3730(e)(4)(A).

II. The Court Of Appeal's Determination of Federal Subject Matter Jurisdiction By An Apparent De Novo Review Of The District Court's Findings Is Contrary to *Anderson v. City of Bessemer City*

This Court has established an unequivocal standard of review to be applied by the courts of appeal when reviewing factual

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[11] As the Dissent points out, the appellate court's expansive gloss on *Springfield* is also contrary to the presumption against jurisdiction. *See, United States ex rel. Precision Co. v. Koch*, 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 1364 (1993).

determinations. Where a district court makes factual determinations, regardless of whether the facts are disputed, the appellate court must review those findings under the clearly erroneous standard. *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). Absent a finding of clear error, the appellate court may not substitute its judgment for that of the district court. This well-established law mandates that such a substitution is inappropriate. *See Favors v. Fisher*, 13 F.3d 1235, 1238 (8th Cir. 1994) ("Where two permissible views of the evidence exist, the district court's choice between them cannot be clearly erroneous. *Anderson*, 470 U.S. at 574").

Legal issues decided by a district court in determining its subject matter jurisdiction are to be reviewed *de novo*. *United States v. Northrop Corp.*, 5 F.3d 407, 409 n.5 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1543 (1994). However, when a district court decides material issues of fact in making a determination of its subject matter jurisdiction, the appellate court must review those findings only for clear error. *Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d 468, 470 (8th Cir. 1993); *Northrop Corp.*, 5 F.3d at 409 n.5, *cert. denied*, 114 S.Ct. 1553 (1994).

The district court resolved several key factual issues in its determination that it lacked subject matter jurisdiction. Although the evidence submitted was documentary and not contradicted in any material respect, the interpretation of the evidence was hotly contested. When a district court chooses among disputed inferences from uncontradicted facts, its findings are entitled to review under the clearly erroneous standard. *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 291 (1960). *See also Sheehan v. Gustafson*, 967 F.2d 1214 (8th Cir. 1992).

The district court found that "the significant transactions which underlie Rabushka's FCA claim were disclosed" prior to Rabushka's filing his complaint. App. at 46B. The district court further found that "an actual allegation of fraud was essentially

made in December by Frank Cummings, counsel for CF&I." App. at 47B. The district court's findings that the publicly-disclosed facts and circumstances are substantially the same facts and circumstances alleged in Rabushka's complaint are the findings of fact subject to the clearly erroneous standard of review.

Without discussion of the standard of review, the court of appeals disagreed with those findings and made findings of its own. Apparently the appellate court reviewed the facts *de novo* and then substituted its own judgment for that of the district court. The Eighth Circuit second-guessed the district court's findings without ever making a determination that those findings were clearly erroneous and in contravention of the appropriate standard of review.

The appeals court's departure from settled authority is most apparent with respect to its treatment of the statement of Frank Cummings, CF&I's counsel, made in the bankruptcy proceeding. "[T]he district court viewed this statement as tantamount to a public allegation of fraud" which was itself sufficient to bar subject matter jurisdiction. App. at 4A. In reversing the district court, the appellate court disagreed with that factual finding, writing "although [Cummings' statement is] hardly complimentary, [it] is by itself insufficient to rise to the level of a public allegation of fraud on the part of Crane." App. at 4A. Although other fact finders may differ about the meaning of Mr. Cummings' statement, the finding was not clearly erroneous. The Eighth Circuit simply usurped the fact-finding role of the district court.

The court of appeals made other substitutions of its findings of fact for those of the district court. App. at 5A-8A. The appellate court examined several items of evidence from which the district court made the factual determination that public disclosures of the facts on which Rabushka's claims are based occurred before Rabushka filed his lawsuit. In each instance, the

appellate court made its own determination of the facts and inferences drawn from those facts. Just like its treatment of Mr. Cummings' statement, the court of appeals apparently applied a *de novo* standard of review and reversed the district court's findings without any indication that those findings were clearly erroneous.

The Eighth Circuit's departure from the standard of review established in *Anderson v. City of Bessemer City* threatens to erode appellate court deference to the factual findings of trial courts. This case presents the Court with a significant opportunity to restore the validity of *Bessemer City*.

CONCLUSION

For the foregoing reasons petitioner respectfully requests that this Court grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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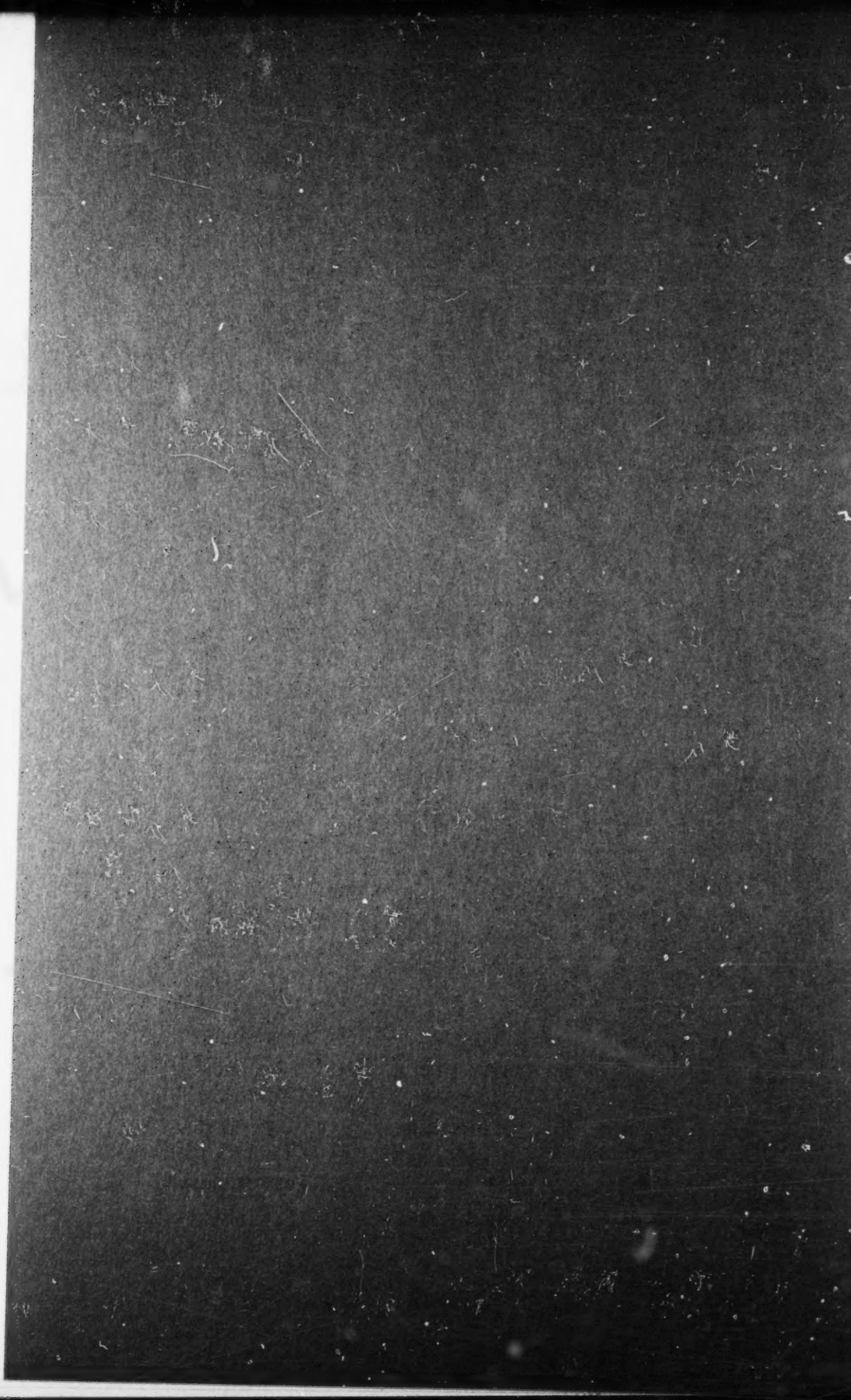
Dated: April 19, 1995.



UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 93-3212

United States of America, ex rel. Stanley D. Rabushka;
Stanley D. Rabushka, Individually,
Plaintiffs/Appellants,

v.

Crane Company,
Defendant/Appellee.

CF & I Steel Corporation
Defendant.

Submitted Sept. 12, 1994.

Decided Nov. 16, 1994

Robert L. King, St. Louis, MO, argued
(Rex Carr, on brief),
for appellants.

William H. Webster, Washington, DC, argued
(Joseph S. Genova, David W. Harlan and John T. Walsh,
on the brief), for appellee.

Before WOLLMAN, MAGILL, and BEAM, Circuit Judges

WOLLMAN, Circuit Judge.

Stanley D. Rabushka brought this *qui tam* action against Crane Company ("Crane") and CF & I Steel Corporation ("CF & I") under the False Claims Act (the "Act"), 31 U.S.C. §§ 3729 and 3730. Finding that it was "based upon the public disclosure of allegations or transactions" relating to the alleged fraud, the district court dismissed the suit for lack of subject matter jurisdiction pursuant to section 3730(e)(4) of the Act. Rabushka

appeals that determination and alternatively seeks to amend his complaint to satisfy the jurisdictional requirements. We reverse and remand.

I. Background

Crane spun off its subsidiary CF & I to shareholders in 1985. At that time CF & I's unfunded pension liability was stated at approximately $46 million. CF & I's financial condition worsened after the spinoff, in large part because of its burgeoning unfunded pension obligation. In November 1990, with an estimated $140 million unfunded pension liability, CF & I filed for bankruptcy. In March 1992, when the unfunded pension liability had grown to approximately $270 million, the Pension Benefit Guaranty Corporation ("PBGC") terminated CF & I's pension plan and assumed those plan obligations that were protected by the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.*

Rabushka, a Crane shareholder at the time of the spinoff, filed suit on February 28, 1991,[1] contending that his discussions with Crane executives at the time of the spinoff prove that the unfunded pension liability was fraudulently understated and that the CF & I spinoff was designed to shift Crane's pension responsibility to the PBGC.

II. Discussion

Section 3730(e)(4) provides:

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[1] Rabushka's initial suit was dismissed by the district court as premature because CF & I's pension fund plan had not yet been terminated by the PBGC. That dismissal was appealed, and during the pendency of the appeal the PBGC terminated CF & I's plan. The appeal was subsequently dismissed and remanded. Prior to the remand, however, Rabushka filed a second complaint at the district level. The two proceedings were consolidated in the instant proceeding.

(e) Certain actions barred.

****

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has provided the information to the government before filing an action under this section which is based on the information.

[1] The Act's jurisdictional scheme is designed to promote private citizen involvement in exposing fraud against the government, while at the same time prevent parasitic suits by opportunistic late-comers who add nothing to the exposure of the fraud. *See United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, _____ U.S. _____, 113 S.Ct. 1364, 122 L.Ed.2d 742 (1993); *United States ex rel. Stinson v. Prudential Ins.*, 994 F.2d 1149, 1154 (3d Cir. 1991). This sense of balance is reflected in the historical development of the Act. *See United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649-51 (D.C. Cir. 1994); *Stinson*, 994 F.2d at 1153-54. We have not yet specifically addressed the scope of the section 3730(e)(4)(A) jurisdictional bar in this circuit.

A. Public Disclosure of Allegations

[2] The district court based its dismissal in part on statements made at a creditors' meeting following CF & I's bank-

ruptcy filing. At that meeting, Frank Cummings, counsel for CF & I, said:

> [T]here were what we believe to be miscalculations, putting the kindest possible face on it, by the actuary for this plan who was retained by the former parent of the company, Crane. And those miscalculations — it is a pejorative term. Those calculations which did not display what we believe should have been displayed were not discovered until at or about the time of the spin-off which occurred in 1985.

The district court viewed this statement as tantamount to a public allegation of fraud.

Cummings also stated, however, that the rise in the unfunded pension liability after the spinoff was the result of a number of additional factors: actuarial assumptions, downsizing in the steel industry (where special early retirement benefits arise when facilities shut down), and discount rate changes all contributed to the massively underfunded debt. Moreover, Cummings also said that "[y]ou can be underfunded in this universe in any industry including steel simply by obeying the law" that allows a forty-year amortization period for the pension liability. When viewed in this context, Cummings' offhand remark, although hardly complimentary, is by itself insufficient to rise to the level of a public allegation of fraud on the part of Crane.

B. Public Disclosure of Transactions

Several developments since the district court ruling assist us in analyzing the proper effect of the public disclosure of these transactions under section 3730(e)(4)(A).

In *Springfield*, pay vouchers and telephone records disclosed during discovery in an earlier suit were deemed insufficient to constitute "allegations or transactions" within the terms of the Act's statutory bar. 14 F.3d at 653-56. The *Springfield* court found the preclusive effect of section 3730(e)(4)(A) to apply

only when "the critical elements of the fraudulent transaction themselves [are] in the public domain." *Id.* at 654. Because mere disclosure of the subject matter transaction was deemed insufficient to prevent a *qui tam* suit, *id.* at 653, the *Springfield* relator's additional disclosures alleging fraud in the vouchers and telephone records sufficed to surmount the statutory bar.

Another recent case, *Cooper v. Blue Cross and Blue Shield of Fla.*, 19 F.3d 562 (11th Cir. 1994) (per curiam), involved a Government Accounting Office report that criticized a particular Blue Cross and Blue Shield of Florida ("BCBSF") payment monitoring plan and noted a potential conflict of interest. The report, however, did not allege any wrongdoing by BCBSF, so the court found it to "not constitute a 'public disclosure of allegations or transactions' that BCBSF knowingly violated" the law. *Id.* at 567. While it did not explain its analysis in detail, the court did not invoke the transactional aspect of the bar despite the fact that the hospital payments and monitoring plan detailed in the report were also the subject transactions of the relator's claim of fraudulent BCBSF conduct.

[3] These intervening decisions persuade us that the district court's reliance on the mere disclosure of the "subject transactions" reads the jurisdictional bar too broadly. We agree with *Springfield* that the essential elements exposing the transaction as fraudulent must be publicly disclosed as well. *See* 14 F.3d at 654.

[4] Crane relies on several articles published by the *Pueblo Chieftain* and other newspapers, CF & I corporate reports, and information disclosed at the creditors' meeting to support the proposition that the subject transactions were sufficiently disclosed to bar Rabushka's suit. While these disclosures publicly reveal Crane's spinoff of CF & I, as well as CF & I's growing unfunded pension woes and eventual bankruptcy, they do not raise the inference that Crane officials intentionally and fraudu-

lently understated the pension problem in an attempt to avoid liability.

A May 1985 article in the *Chieftain* mentioned Crane's concerns about the pension liability and how the spinoff relieved Crane of that liability. The article does not, however, indicate that the liability was fraudulently understated. Nor does it impute any bad faith to Crane. In fact, the article was optimistic about CF & I's future, describing "CF & I's recovery" and return to profitability in the hard-pressed steel industry. An April 7, 1985, *Sunday Chieftain & Star - Journal* article noted that the spinoff would leave both Crane and CF & I better off in the market, stating that it was "engineered to allow Crane to focus on its main areas of interest" rather than on the ups and downs of the steel market. These 1985 articles do not indicate at all that Crane was scheming to dump the pension liability on the government. Rather, the April article noted that CF & I was "in the black once more, thanks in large measure to Crane's earlier investments."

The news articles cited by Crane that appeared after the spinoff detail the discovery of the pension fund problems, but they still do not give rise to an inference of fraud on the part of Crane. A July 1990 *Chieftain* article noted that the pension liability was CF & I's "greatest stumbling block to profitability" and mentioned the termination discussions with the PBGC, but again does not indicate any intentional wrongdoing on the part of Crane or CF & I officials or expose the essential element of the fraud alleged by Rabushka.

[5] Similarly, a November 8, 1990, article in the *Chieftain* detailing CF & I's bankruptcy filing and the PBGC's involvement does not indicate that Crane executives misled shareholders or the government when it spun off CF & I. That same article goes on to detail Crane's discovery as a result of a 1985 actuarial study that the annual pension bill was more than triple the original estimate. Although this clearly makes public CF & I's pension plan problems, it does not, either by itself or in conjunc-

tion with the other public disclosures cited by Crane, place the additional set of facts alleged by Rabushka—that Crane officials intentionally understated the pension liability in an attempt to defraud the government—in the public domain. The article itself described CF & I's negotiations with the PBGC as "a good faith effort" to resolve the problems.

The same day as the November 8, 1990, *Chieftain* article, another article about CF &I's bankruptcy filing appeared in the *Denver Post*. This article, although cited by Crane, belies the theory that the subject transactions were adequately disclosed to bar the suit. The article mentioned that seven of the ten largest unfunded pensions assumed by the PBGC came from the steel industry and discusses the PBGC's fear of its own $1 billion deficit. If anything, this article raises the inference that the pension problems were part and parcel of the problematic steel industry and that involvement by the PBGC was more the result of industry economics than any fraudulent activity on the part of Crane.

[6] Our analysis also holds true for the corporate reports[2] and creditors' meeting disclosures relating to the pension liability. Although CF & I's pension fund woes were squarely in the public eye prior to Rabushka's suit, the available information cited by Crane reports seemingly legitimate transactions and

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[2] Our analysis of the level of disclosure sufficient to bar a suit holds equally true for both the news accounts and corporate reports. Corporate reports, however, are also insufficient as a jurisdictional bar to the action because they are not contemplated by the terms of the statute. *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499 (11th Cir. 1991) ("the methods of 'public disclosure' set forth in section 3730(e)(4)(A) are exclusive of the types of public disclosure that would defeat jurisdiction under that section"); *see also United States ex rel. Le-Blanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990) (section 3730(e)(4)(A) "does not deny jurisdiction over actions based on disclosures other than those specified"), *cert denied*, 499 U.S. 921, 111 S.Ct. 1312, 113 L.Ed.2d 246 (1991).

fails to suggest to the uninitiated reader the state of affairs alleged by Rabushka—that CF & I's pension liability was intentionally understated and that the spinoff was concocted in the hope that Crane would avoid eventual liability. Rabushka was the first to assert that Crane officials knew that the underfunding at the time of the spinoff was much greater than reported and that Crane officials were aware that the liability was sufficient to "sink" Crane if Crane was held responsible. Therefore, not "enough information exist[ed] in the public domain to expose the fraudulent transaction" and invoke the jurisdictional bar. *Springfield*, 14 F.3d at 654; *see Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992).

We do not require the public disclosure of a patently fraudulent transaction to bar a suit under the Act. Rather, the bar is given effect when the essential elements comprising that fraudulent transaction have been publicly disclosed so as to raise a reasonable inference of fraud. *See Springfield*, 14 F.3d at 655 (noting that the presence of only one state of facts in the public domain "cannot be expected to set government investigators on the trail of fraud"). Much as in *Springfield*, we "are confident in this case that the information put in the public domain...did not present so clear or substantial an indication of foul play as to qualify as either an allegation of fraud or a fraudulent transaction." *Id.* at 656.

Our decision is also supported by the recognized purpose of the Act. Embracing too broad a definition of "transaction" threatens to choke off the efforts of *qui tam* relators in their capacity as "private attorneys general." *See Cooper*, 19 F.3d at 566. By allowing Rabushka's complaint to proceed beyond the jurisdictional inquiry, we help ensure that private actions designed to protect the public fisc can proceed in the absence of governmental notice of a potential fraud. *Springfield*, 14 F.3d at 655, 657. This is not the type of case that Congress sought to bar, precisely because the publicly disclosed transactions involved do not raise such an inference of fraud.

Because we conclude that the publicly disclosed "allegations or transactions" proffered by Crane do not encompass the essential element of the fraud alleged in Rabushka's complaint and therefore do not fit within the terms of the jurisdictional bar, we need not address whether Rabushka's allegation of fraud is "based upon" those "allegations or transactions." Nor need we address concerns about the original-source exception to the jurisdictional bar and Rabushka's proposal to amend his complaint in an attempt to meet that exception. *See id.* at 651; *Wang*, 975 F.2d at 1416.

The judgment is reversed, and the case is remanded to the district court for further proceedings.

MAGILL, Circuit Judge, dissenting.

I respectfully dissent. The majority frustrates the intent of Congress and ignores the lessons of history by opening wide the floodgates for the very "second toots" and parasitic lawsuits that Congress sought to prevent with 31 U.S.C. § 3730(e)(4)(A). Rabushka's *qui tam* action is the paradigmatic example of the parasitic actions that Congress sought to prevent; Rabushka has merely cobbled together allegations derived from newspaper articles, disclosures to the SEC and statements before the bankruptcy court. Moreover, although the majority pays lip service to *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994), it seriously misapplies and misinterprets that case. The majority misapplies *Springfield* by considering only selected portions of the public disclosures and then concluding that this artificially deflated amount of information was insufficient to trigger the jurisdictional bar of § 3730(e)(4)(A). The majority isolates each news article and completely ignores the most damaging disclosures before the SEC. The majority also misinterprets *Springfield* as requiring public disclosure of all the elements of a fraudulent transaction, when *Springfield* clearly states that the bar applies whenever there is a public disclosure of information "sufficient to enable (the government)

adequately to investigate the case and to make a decision whether to prosecute." 14 F.3d at 654 (internal quotation and citation omitted). Because the voluminous public disclosures in the news, before the SEC and before the bankruptcy court were sufficient to, *and in fact did*, enable the government to investigate, I would affirm the district court in all respects.[3] Because the panel has omitted many of the facts involved in this appeal, I will briefly state the pertinent facts omitted by the majority.

I. OMITTED BACKGROUND

Crane acquired CF & I Steel Corporation (CF & I) in 1969, and after unsuccessfully trying to sell CF & I for over a year, Crane distributed its shares of CF & I as a dividend to Crane shareholders in May 1985. At the time of the spin-off, CF & I's unfunded pension liability was represented to be approximately $46.4 million, and CF & I's shareholder equity was represented to be almost $82 million. App. at 83, 86. On May 19, 1985, less than a week after the shareholder vote on the proposed spin-off, App. at 297, an article appeared in *The Pueblo Star-Journal and Sunday Chieftain,* stating that "[o]ne of the concerns that workers, and potential investors, have had is (CF & I's) pension liability, a major cost that will no longer be the responsibility of the much larger Crane Co." App. at 240.

Also in 1985, in connection with an unrelated SEC investigation concerning suspected insider trading in Crane securities, five Crane officers appeared before the SEC and testified extensively regarding Crane's motivation to spin CF & I off, CF & I's prospects for survival, and virtually every other aspect of

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[3] While I agree with the majority that the district court's application of the jurisdictional bar whenever there is disclosure of the "subject transactions" was too broad, I believe that "in its attempt to evade Scylla, [the panel majority has] steered precipitously close to Charybdis." *Springfield*, 14 F.3d at 650.

Rabushka's claim. These hearings publicly disclosed[4] that: (1) before and during the spin-off, Crane knew that CF & I was financially troubled and unable to survive if spun off without long-term financing; (2) CF & I never obtained long-term financing; (3) a CF & I bankruptcy was virtually inevitable whether or not CF & I was spun off; (4) Crane would be responsible for CF & I's unfunded pension liability if CF & I was not spun off and independent for some period of time; (5) Crane was in a hurry to spin CF & I off; and (6) Crane's motivation for quickly spinning CF & I off was solely to avoid liability for CF & I's unfunded pension obligations. In essence, Crane was publicly disclosed to be desperate to unload CF & I as quickly as possible in order to maximize its chance to avoid CF & I's significant unfunded pension obligations. These disclosures clearly establish Crane's motive for fraudulently concealing the true extent of CF & I's obligations in order to facilitate the spin-off. Although these SEC hearings contain several significant disclosures about the motives and knowledge of Crane, the majority inexplicably ignores them.

On July 2, 1985, Benjamin R. Jacobson testified before the SEC, stating that in February 1984, the Crane board of directors considered CF & I to be a liability and sought to avoid liability for CF & I's unfunded pension obligations in the event of a CF & I bankruptcy:

> Q What did you value CF [&] I at per share of Crane common? This is as of February 28[, 1984]?
>
> . . . .

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[4] Disclosures made in testimony during a hearing before the SEC are public disclosures under 31 U.S.C. § 3730(e)(4)(A) ("No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a[n] ... administrative hearing.").

A [Jacobson] Well, I would say that we probably were valuing CF [&] I at anything from a negative number to a number [based on negotiations for sale to U.S. Steel].

Q What was the basis of that valuation?

A Well, we did not spend a great deal of time analyzing CF [&] I. And the time we spent analyzing CF [&] I was more from a defensive standpoint in that we were concerned that [sic] the possibilities that CF [&] I would go bankrupt, and what claims or liabilities might kick back to the new holders of Crane shares.

And we thought that was a serious consideration or problem.

App. at 385-86.

On September 11, 1985, Robert S. Evans gave similar testimony before the SEC, disclosing that CF & I's impending bankruptcy was a major concern for Crane:

Q Do you recall a discussion of CF & I at the meeting, at the February 27[, 1984] meeting?

A [Evans] I can see, yeah, [the minutes refresh my recollection]—there's a point here it says a dividend with CF [&] I which, I guess, isn't on the agenda. It's a spin-off of CF & I Steel. I—in that discussion, I pointed out a number of problems with dividending CF [&] I at that time to the shareholders; one of them being that there was no long-term financing in place [for CF & I]. The company had a one to one current ratio, with no long term financing, or prospect of it, at that time. Also, I think [the dividend] may have been ... taxable, instead of tax-free. I may have expressed my opinion, which is one that I certainly have of giving the stockholders a taxable dividend in a bankrupt company wasn't doing them a favor.

App. at 377-78.

On September 20, 1985, Robert Joseph Slater testified that CF & I's obtaining long-term financing was the key to its survival:

> Q In addition to discussing how long it would take to dispose of CF & I, did you and R.S. Evans discuss whether it would be possible to dispose of CF & I?
>
> A [Slater] Yes.
>
> Q What do you recall being said in that respect?
>
> A Whether it would be possible to dispose, or to spin off CF & I as a viable entity realistically looking at its near term past performance and its negative cash flow.
>
> Q Did you express a view o[r] come to a view with R.S. Evans as to whether CF & I could be spun off from Crane Co. and become an independent entity?
>
> A Yes.
>
> Q What view did you express?
>
> A I felt that CF & I could become a viable, independent entity provided long term financing could be achieved.
>
> Q What did you mean by long term financing?
>
> A Financing of over one year.
>
> Q Did you mean cash to satisfy the shortfall in the cash flow, or cash for capital expenditures? What did you mean?
>
> A I meant CF & I required a financing of significant amount to cover the shortfall in cash flow and to provide working capital.
>
> Q Did you express a view of the likelihood of CF & I obtaining such financing?

A Yes.

Q What view did you express?

A I expressed the view that that would be a very difficult accomplishment.

Q What view if any did R.S. Evans express regarding whether CF & I could be spun off as an independent entity?

A I believe he shared that view.

Q On what is that belief based?

A My recollection of our conversation.

Q Prior to the February [1984] Board meeting did you ever discuss with Mr. O'Brien whether CF & I could be spun off as an independent entity?

A Yes.

Q What view, if any, did you express to Mr. O'Brien?

A The same view that I expressed to Mr. Evans.

Q That CF & I would be viable if it could obtain long term financing, but that long term financing would be difficult to obtain?

A That's correct.

Q Did Mr. O'Brien express a view to you as to the possibility of spinning CF & I off as an independent entity?

A Yes.

Q What view did he express?

A That CF & I could be spun off as a viable entity provided long term financing could be obtained.

Q Was there any discussion as to whether CF & I could be spun off even if it was not a viable entity?

A Yes.

Q What do you recall about such discussions?

A Well, if it was spun off and it was not a viable entity CF & I would go into bankruptcy, either Chapter 11 or 7.

App. at 402-04.

On October 3, 1985, Dwight Church Minton testified before the SEC, indicating that among his very few recollections was a recollection that spinning off CF & I was a "familiar" and "very lively" issue in 1984, and that because "CF & I was a huge source of losses to [Crane]," it was a "constant source of discussion." App. at 390-91. Minton also recalled that he had an "impression" that Thomas M. Evans thought it desirable to spin CF & I off, App. at 395, and that "there's a real question as to whether CF & I could last any length of time as an independent company, and should it fail to operate as an independent company for some length of time, which I don't recall, it could result in liabilities coming back to Crane, which would be an extremely serious matter. It was a huge issue in my mind because the operating losses had been so incredibly large." App. at 397.

On October 22, 1985, Thomas M. Evans testified concerning discussions at a December 1983 meeting of Crane's directors in which various directors expressed concern that CF & I was unable to obtain long-term financing:

Q Was there any discussion as to whether CF & I had adequate long-term financing?

A [Evans] There was never any—the credit was so bad you couldn't have—I don't even think it says long-term financing now. They're borrowing all the receivables and things like that. And that's the way it was going then.

App. at 367. Evans further testified that as a result of CF & I's poor financial condition, the effects of a CF & I bankruptcy were of great concern to Crane when it considered whether to spin CF & I off:

> Q Did you participate in any discussion prior to the February [1984] board meeting as to what if anything would be the consequences if CF & I ... went into bankruptcy?
>
> A Yes, I went over the law on that, I think, with Mr. Queenan, and if it went into bankruptcy in a very short time, Crane would have been li[able]. If it stood on its own for a longer period of time, it would be out under its own. I don't remember if it was six months or 12. Something like that.
>
> . . . .
>
> Q And did anyone express concern regarding the consequences to Crane Co. if CF & I went bankrupt within—
>
> A If CF & I were what?
>
> Q If CF & I did go bankrupt within a short time after the spin[-]off?
>
> A It's obvious, if it was a subsidiary to Crane they would be li[able]. The only thing is if they got rid of it, you wouldn't be li[able] if it stayed a certain time.
>
> Q And was there—
>
> A It was certainly to Crane's advantage to spin it off promptly.

App. at 367-69. Prompt spin-off was advantageous because the directors and potential lenders knew that CF & I "wasn't in strong financial shape." App. at 369-70. T.M. Evans further

testified that the entire reason for the decision to spin CF & I off was to avoid liability for CF & I's unfunded pension obligations:

> Q Do you recall any discussions you had with anyone regarding to [sic] any pension issues relating to the spin[-]off of CF & I?
>
> A Pension?
>
> Q Pension.
>
> A Yes, that's the whole thing we were talking about. The liability if the pensions were unfunded would come back on Crane, unless you'd have been spun off for a certain length of time.
>
> Q I see. That was a specific bankruptcy concern?
>
> A Yes.

App. at 370-71.

After being spun off, CF & I lasted longer than anyone anticipated. However, due to its rapidly growing unfunded pension liability[5] and continued operating losses, *see* App. at 242, 244, 245, CF & I revealed that it might not be able to meet its minimum pension fund contribution in September 1990, and entered into negotiations with the Pension Benefit Guaranty Corporation (PBGC) in an attempt to "restructure the pension obligation." App. at 270a. From May through September, speculation about the future of CF & I and its pension plan generated several news articles that detailed the nature of CF &

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[5] CF & I's 1986 Annual Report indicates that unfunded pension liability was approximately $55.6 million in 1985. The same report indicates that by 1986, this figure had increased to $120.5 million. By 1989, CF & I revealed that this figure had risen to $134 million. In 1990, the PBGC calculated CF & I's unfunded pension obligation to be $152 million. By 1992, these liabilities had mushroomed to about $270 million.

I's pension obligations and the underfunding of these obligations, often speculating about the reasons for the underfunding. App. at 243, 245. One of these articles speculated that CF & I might try to shift these obligations to the PBGC.[6] App. at 244. Other articles reported rumors that the pension plan was being terminated and discussed the effects of such a termination. App. at 246-47.

CF & I was in fact unable to make its minimum pension fund contribution in September 1990, and as a result, on November 7, 1990, CF & I filed for Chapter 11 bankruptcy. This filing caused quite a stir in the local media, and several news articles detailing the financial woes of the company appeared during early November. App. at 251-56. It was during bankruptcy proceedings initiated by this petition that Cummings made his "hardly complimentary" statement about Crane's "miscalculations." Meanwhile, as a result of this flood of publicity, the PBGC became suspicious and began an investigation of Crane sometime prior to Rabushka's filing suit. App. at 307-08.

Rabushka filed his first False Claims Act (FCA) complaint against Crane and CF & I on February 28, 1991. The district court dismissed this action as unripe because the PBGC had not yet assumed CF & I's unfunded pension obligations, and therefore no obligation on the part of the United States to pay out sums of money, as required for a FCA claim, had arisen. Rabushka appealed the dismissal to this court. While the appeal was pending, the PBGC terminated the pension plan, thereby assuming responsibility for CF & I's unfunded pension obligations. Accordingly, we dismissed the appeal and remanded the case to the district court. On March 20, 1992, Rabushka filed a second FCA complaint against Crane (but not CF & I) that included the allegations of the first complaint and added allegations concern-

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[6] If CF & I was unable to satisfy its obligations, the obligations would fall on either the PBGC or Crane, as CF & I's (former) parent.

ing the termination of the pension plan by the PBGC. These two cases were consolidated by the district court, and an order to dismiss was entered on June 1, 1993.[7] On June 18, Rabushka moved to amend the complaint, and the district court denied the motion. As the majority notes, this appeal is from the two consolidated actions.

II. DISCLOSURES TO THE SEC, THE BANKRUPTCY COURT AND IN THE NEWS MEDIA CONSTITUTE A "PUBLIC DISCLOSURE OF ALLEGATIONS OR TRANSACTIONS"

A. Congressional Intent and History of the *Qui Tam* Provisions of the False Claims Act

Any attempt to interpret the *qui tam* provisions of the FCA must begin with the history of that Act, for "[t]he past serves as prologue; some familiarity with their tortuous, wending history is critical to an understanding of the latest set of amendments to the *qui tam* provisions." *Springfield*, 14 F.3d at 649. The history of the *qui tam* provisions has largely been one of "[s]eeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Id.*; *see also United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 552 (10th Cir. 1992) (noting dual purpose of *qui tam* provisions of FCA), *cert. denied*, ____ U.S. ____, 113 S. Ct. 1364, 122 L.Ed.2d 742 (1993).

Section 3730's *qui tam* provisions originated from the False Claims Act of 1863, which was enacted due to "the gravity of the consequences which resulted from unscrupulous contractors supplying inferior goods to the Union military when the

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[7] Crane is the only party defendant in these consolidated actions that has been served.

Government's resources were too strapped by the war effort to enable effective prosecutions of these crimes." *John T. Boese, Civil False Claims and Qui Tam Actions* 1-7 to 1-8 (1993); *see* S. Rep. No. 345, 99th Cong., 2d Sess. 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. The *qui tam* provisions of the 1863 Act were:

> passed upon the theory, based upon experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

United States v. Griswold, 24 F. 361, 366 (D. Or. 1885). Senator Howard, the bill's sponsor, put it a bit more succinctly, noting that the *qui tam* provisions were effective because they "set[] a rogue to catch a rogue." *Boese, Qui Tam Actions* 1-8. Although the *qui tam* provisions under the FCA of 1863 were quite generous, they remained largely unused due to the lack of any governmental involvement in the economy comparable to the military buildup associated with the Civil War. *Id.* at 1-9 to 1-10. All this changed with the enactment of New Deal legislation and the military buildup associated with World War II. *Springfield*, 14 F.3d at 649; *Boese, Qui Tam Actions* 1-10. Government contracts boomed, and with them opportunities for government contractors to profit through fraud. *Springfield*, 14 F.3d at 649; *Boese, Qui Tam Actions* 1-10.

Qui tam actions correspondingly surged, reaching their zenith in 1943, when the Supreme Court decided *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943). In *Hess*, the government had filed fraud indictments against several electrical contractors. Morris L. Marcus, an enterprising

if unscrupulous *qui tam* relator, obtained a copy of one of these indictments and copied the allegations directly into his complaint in an action brought under the *qui tam* provisions of the 1863 Act. The Supreme Court, noting the absence of any impediment to Marcus's suit in the text of the 1863 Act, and finding no intent to impose such an impediment in the legislative history of the 1863 Act, declined to establish such a bar on its own initiative. *Id.* at 546. Marcus was thus able to claim half of any resulting civil judgment.

The decision in *Hess* brought quick opposition from the Attorney General, who sought outright repeal of the *qui tam* provisions. There was considerable resistance to repeal, however, and the result of this tug of war was a compromise. S. Rep. No. 345, 99th Cong., 2d Sess., at 11-12, *reprinted in* 1986 U.S.C.C.A.N. at 5276-77. This compromise was embodied in the 1943 amendments which provided:

> The court shall have no jurisdiction to proceed with any such *[qui tam]* suit ... or pending suit brought under [this section] whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.

Pub.L. No. 78-213, 57 Stat. 608, 609 (1943) (codified as 31 U.S.C. § 232 (1976)) (superseded). These amendments led to decreased use of the *qui tam* provisions, but as government involvement in the national economy expanded, so did the number of FCA suits. *Boese, Qui Tam Actions* 1-12 to 1-13.

Two lines of jurisprudence developed from these suits. First, a test for determining the amount of information that must be in the government's possession to activate the jurisdictional bar was developed. *See. e.g., Pettis ex rel. United States v. Morrison-Knudsen Co.,* 577 F.2d 668, 673-74 (9th Cir. 1978); *United States ex rel. Weinberger v. Florida,* 615 F.2d 1370, 1371 (5th

Cir. 1980); *United States ex rel. Joseph v. Cannon,* 642 F.2d 1373, 1377 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 999, 102 S.Ct. 1630, 71 L.Ed.2d 865 (1982); *United States ex rel. Wisconsin v. Dean,* 729 F.2d 1100, 1103-04 (7th Cir. 1984); *United States ex rel. MacFarlane v. Hutchinson,* 519 F. Supp. 563, 564-65 (D. Colo. 1981). Second, courts uniformly held that the absence of an "original source" exception to the jurisdictional bar precluded *qui tam* actions by individuals, even if those individuals were the original source of all information in the government's possession. *Wang ex rel. United States v. FMC Corp.,* 975 F.2d 1412, 1419 (9th Cir. 1992). The Senate version of the 1943 amendments contained an original source exception to the jurisdictional bar, but this provision was deleted from the conference report without any explanation. S. Rep. No. 345, 99th Cong., 2d Sess., at 12, *reprinted in* 1986 U.S.C.C.A.N. at 5277; *Springfield,* 14 F.3d at 650. The most extreme example of this second trend was the *Dean* case. In an attempt to reach the mean between the two extremes represented by *Hess* and *Dean,* Congress enacted the 1986 amendments which we now interpret.

The legislative history of the 1986 amendments specifically mentions the *Dean* case, noting that in *Dean:*

> the Court refused to allow the State of Wisconsin to act as a *qui tam* relator in a Medicaid fraud action even though the investigation had been conducted solely by the State of Wisconsin. The Court found that the Federal Government was in possession of the information due to the State disclosures of the fraud to the Department of Health and Human Services. The State was required to make such disclosures under Federal law governing Medicare programs. Interestingly, the Federal Government in this case not only declined to intervene and take over the suit, but filed a brief with the Court indicating its belief that Wisconsin was a proper relator. In rejecting the views of both the

Federal Government and the State of Wisconsin, the Court noted that:

> If the State of Wisconsin desires a special exemption to the False Claims Act because of its requirement to report Medicaid fraud to the federal government, then it should ask Congress to provide the exemption. [*Dean*, 729 F.2d] at 1106.

S. Rep. No. 345, 99th Cong., 2d Sess., at 12-13, *reprinted in* 1986 U.S.C.C.A.N. at 5277-78. The *Dean* case fits squarely within both trends. *Dean* held that: (1) the quantum of information in the possession of the government was sufficient to trigger the jurisdictional bar, *Dean*, 729 F.2d at 1103-04, and (2) the jurisdictional bar contained no implied original source, or state source, exception, *id.* at 1104-07. The Senate Report mentions only the latter holding. The quote found in the Senate Report was taken directly from the portion of *Dean* that discussed the lack of an original source exception. While both the plain language of the statute and the legislative history demonstrate a clear intent to reverse this aspect of *Dean*, Congress manifested no such intent regarding the first holding of *Dean* and the numerous other cases following *Pettis*. *See Wang*, 975 F.2d at 1419 (noting that the restrictive interpretation that barred suits by original sources was "too much for Congress"); *United States ex rel. Hartigan v. Palumbo Bros.*, 797 F. Supp. 624, 629 (N.D. Ill. 1992) (noting congressional dissatisfaction with "original source" aspect); *Erickson ex rel. United States v. American Inst. of Biological Sciences*, 716 F. Supp. 908, 917 (E.D. Va. 1989) (noting that original language of Senate bill broadened jurisdictional bar, but added original source provision).[8]

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[8] The legislative history of the 1943 amendments indicates that at least some members of Congress mistakenly believed that an original source could bring a suit under those amendments. *See* S. Rep. No. 345, 99th Cong., 2d Sess., at 12, *reprinted in* 1986 U.S.C.C.A.N. at 5277. In light of this confusion, the 1986 amendments may easily be viewed as a correction of this misunderstanding.

We presume that Congress acts with knowledge of existing law. *Estate of Wood v. C.I.R.*, 909 F.2d 1155, 1160 (8th Cir. 1990). This is especially true where, as here, the law with which we presume familiarity consists of a case cited in the legislative history. Thus, when interpreting the statute, we must consider it in light of the judicial concepts existing before it was enacted. *Estate of Wood*, 909 F.2d at 1160. "[A]bsent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction." *Estate of Wood*, 909 F.2d at 1160 (internal quotation and citation omitted). Here, Congress changed the text of the jurisdictional bar from a bar of actions "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof," to a bar of actions "based upon the public disclosure of allegations or transactions." Although this is certainly a change in the formulation of the applicable standard, the statutory text and legislative history are both silent concerning the effect of the amendment on the standard itself, *i.e.*, the quantum of information that must be disclosed to activate the jurisdictional bar.[9] I am reluctant to infer a congressional intent to raise this standard from the silence of Congress. *Cf. Central Bank v. First Interstate Bank*, ____ U.S. ____, ____, 114 S. Ct. 1439, 1453, 128 L.Ed.2d, 119 (1994)

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[9] If the text has a plain meaning, it can only be to expand the jurisdictional bar to remove jurisdiction in more cases. However, the text is ambiguous, making reference to extrinsic aids in interpretation, such as the legislative history, appropriate. The legislative history reveals a congressional intent to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government" and to make the FCA "a more useful tool against fraud in modern times." S. Rep. No. 345, 99th Cong., 2d Sess., at 1, *reprinted in* 1986 in U.S.C.C.A.N. at 5266. However, this general intent was effected by the numerous other amendments to the *qui tam* provisions, scienter requirement, and relator compensation schemes. Thus, there is no reason to infer a clear statement of a specific intent to reverse the *Pettis* line of cases from this general intent that was effected through numerous other changes to pre-existing law.

(noting that arguments from congressional inaction are unpersuasive). Therefore, I conclude that the prior judicial constructions of the necessary quantum of disclosure embodied in *Pettis* and its progeny survive the 1986 amendments. Congress has changed where we are to look for the disclosures; we no longer look at information in the government's possession, rather we look at public disclosures. However, Congress did not change the amount of disclosed information we must find when we look there. The pre-1986 test used to determine how much information triggered the jurisdictional bar remains useful as a test to determine how much public disclosure constitutes a disclosure of "allegations or transactions."

My interpretation of the legislative intent is reinforced by the fact that § 3730(e)(4)(A) is a jurisdictional bar. Federal courts construe statutes conferring (or removing) jurisdiction strictly against a finding of jurisdiction. *Precision Co.*, 971 F.2d at 552. Thus, I conclude (and *Springfield* confirms) that Congress intended "allegations or transactions" to preserve the existing law, so that the jurisdictional bar is implicated whenever the disclosures were "'sufficient to enable (the government) adequately to investigate the case and to make a decision whether to prosecute.'" *Springfield,* 14 F.3d at 654 (quoting *Pettis,* 577 F.2d at 674). This standard is quite different from the vastly more restrictive standard adopted by the majority without any reference to the history of the amendments, the intent of Congress, or the prior law.

B. Decision of the D.C. Circuit in *Springfield*

The majority relies heavily upon *Springfield* to support its conclusion that "the essential elements exposing the transaction as fraudulent must be publicly disclosed as well [as the subject

transactions]."[10] Maj. op. at 1512. The majority's analysis of *Springfield* that it uses to support this holding seriously misapplies and misinterprets *Springfield*. First, assuming that the majority's interpretation of *Springfield* is correct, the facts in this case differ significantly from those in *Springfield*. The majority's failure to recognize these differences results in a misapplication of *Springfield*. Second, the majority focuses too narrowly upon a hypothetical posed in the *Springfield* opinion, and thus misinterprets *Springfield*. *Springfield* involved a disclosure of only one of three elements of a fraudulent transaction. The portions of *Springfield* stating that all elements of a fraudulent transaction must be disclosed for there to be a disclosure of "allegations or transactions" must be read in light of the "notice standard" adopted by *Springfield* because these statements erroneously assume that a fraudulent transaction consists of only two elements.

1. The majority ignores significant factual differences between this appeal and *Springfield*.

The majority cites *Springfield* as standing for the proposition that § 3730(e) (4) (A) bars suit only when "'the critical elements of the fraudulent transaction themselves (are) in the public domain.'" Maj. op. at 1512 (quoting *Springfield*, 14 F.3d at 654). Because it is so central to my disagreement with the majority, a more complete quotation is necessary to reveal the context out of which the majority has taken this conclusion:

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[10] The majority opinion also relies upon *Wang*, 975 F.2d at 1412. However, in *Wang*, the disclosures found not to be public consisted of an internal memo between two engineers for a government contractor that was disclosed during discovery in the *qui tam* action. *Id.* at 1416. The *Wang* court's conclusion that no allegations or transactions were publicly disclosed was based upon a consideration of the nature of the disclosure, not the type of information contained in that disclosure. Thus, *Wang* is inapposite here, where there is a concededly public disclosure of information, and the nature of this disclosed information is at issue.

> [I]f X + Y = Z, Z represents the *allegation* of fraud and X and Y represent its essential elements. In order to disclose the fraudulent *transaction* publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, *i.e.*, the conclusion that fraud has been committed. The language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit *qui tam* actions *only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain.

Springfield, 14 F.3d at 654.

Assuming arguendo that the X + Y = Z equation accurately states the requisite elements of an FCA action, the majority misapplies this formula. Although the majority never expressly so states, it apparently assumes that only the represented state of affairs (X) was publicly disclosed prior to Rabushka's suit. The newspaper articles listed by the majority clearly disclose Crane's computations of CF & I's pension liability that are the allegedly false representations, and the corporate documents containing such figures are on file with the SEC.[11] The majority appears to hold that there was no public disclosure of the true facts (Y) *(i.e.*, there was no disclosure of the falsity of Crane's representations) prior to Rabushka's suit. *See* Maj. op. at 1513 ("the available information cited by Crane reports seemingly legitimate transactions"). Therefore, because only one (X) of the two elements comprising the transaction (X and Y) was publicly disclosed, the majority concludes that there was no public disclosure of "allegations or transactions" as required by § 3730(e)(4)(A) in order for the jurisdictional bar to apply. The majority errs in this conclusion.

The allegedly true facts must be determined by reference to Rabushka's complaint. In his complaint, Rabushka alleges that

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[11] *Springfield* itself notes that the represented state of affairs will generally be publicly disclosed. 14 F.3d at 656.

Crane and unidentified coconspirators conspired to evade responsibility for CF & I's unfunded pension liability by simultaneously spinning CF & I off and concealing material facts from the SEC and PBGC. Rabushka characterizes the concealed facts as Crane's and CF & I's respective "interest[s] in, liability for, and intentions with regard to unfunded pension liabilities under [CF & I's] pension plans." *See* App. at 7. Thus, according to Rabushka, the true facts are that CF & I was financially doomed at the time of the spin-off due to the size of the pension obligation, that CF & I was spun off by Crane solely for the purpose of avoiding liability for CF & I's unfunded pension liability, and that the true extent of CF & I's unfunded pension obligations was intentionally understated to facilitate the spin-off. The conversations reported in Rabushka's affidavits parallel these allegations, and are primarily intended to provide evidence of Crane's deliberate understatement of CF & I's unfunded pension obligations.

The true facts alleged by Rabushka have been repeatedly publicly disclosed. Crane's intentions regarding CF & I's unfunded pension liability were fully disclosed by Benjamin R. Jacobson, Robert S. Evans, Robert Joseph Slater, Dwight Church Minton and Thomas M. Evans when they testified before the SEC. Jacobson testified that the Crane board of directors sought to avoid liability for CF & I's unfunded pension obligations. T.M. Evans and Minton testified that unless CF & I could survive for a period of time on its own, Crane would be liable for CF & I's unfunded pension obligations. R.S. Evans testified that CF & I's bankruptcy was a major concern for Crane because of CF & I's cash flow problems and lack of long-term financing. Slater testified that he (and others) expected CF & I to go bankrupt if it did not obtain long-term financing. T.M. Evans confirmed that CF & I never had long-term financing and was unable to obtain such financing. T.M. Evans summed it up nicely when he told the SEC, "if [Crane] got rid of [CF & I], [Crane] wouldn't be li[able] if [CF & I] stayed [viable] a certain time." T.M. Evans

concluded that given CF & I's financial condition, "[i]t was certainly to Crane's advantage to spin [CF & I] off promptly." In light of this and volumes of similar testimony before the SEC, I would find that Crane's intentions regarding CF & I and its unfunded pension obligations were publicly disclosed.

Crane's interest in and liability for CF & I's unfunded pension obligations were also repeatedly disclosed. Again, T.M. Evans and Minton made it clear that unless CF & I "stood on its own" for a period of time, Crane would be liable for CF & I's unfunded pension obligations. Jacobson reiterated this testimony. Crane's potential liability for CF & I's unfunded pension obligations was hardly a secret. Numerous newspaper articles chronicled the ballooning figures, and as early as May 19, 1985, *The Pueblo Star-Journal and Sunday Chieftain* noted that after the spin-off, "[CF & I's] pension liability . . . will no longer be the responsibility of the much larger Crane Co." Significantly, the first non-CF & I figures (provided by the PBGC) were substantially higher than the figures provided earlier by CF & I and Crane. Against this backdrop of rapidly expanding pension liability and corporate desperation, Cummings made his colorful statement that Crane's actuary had "miscalculated" the amount of the pension obligation.[12] Moreover, R.S. Evans referred to CF

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[12] The majority attributes great significance to the fact that Cummings' statement contained several possible innocent explanations for these "miscalculations." Maj. op. at 1512. However, if the miscalculations were truly innocent, it is doubtful that Cummings, who was acting in his role as lawyer for CF & I, would feel obligated to qualify his statement with the observation that such a label was "putting the kindest possible face" on the errors. Moreover, if the miscalculations were merely mistakes, it is unlikely that Cummings would consider "miscalculations" to be a "pejorative term." Although I do not agree with the majority that Cummings' statement was "insufficient to rise to the level of a public allegation of fraud on the part of Crane," I will assume, arguendo, that his statement was not such an allegation and will consider it only as a disclosure of certain elements of the transactions at issue. The majority completely fails to consider this possibility.

& I as "a bankrupt company" in 1985 when CF & I was represented to have $82 million in shareholder equity. Apparently, R.S. Evans' assessment of CF & I's liabilities did not suffer from the "miscalculations" that infected the assessment presented in CF & I's corporate reports. After these repeated public disclosures of Crane's interest in and potential liability for CF & I's unfunded pension obligations, and the burgeoning pension shortfall, it should come as no surprise that the PBGC began an investigation. I would hold that Crane's and CF & I's respective interests in and liability for the unfunded pension obligations were publicly disclosed.

Thus, assuming the majority is correct in its interpretation of *Springfield*, it has misapplied that case to these facts. The majority simply isolates each newspaper article and notes what each article in isolation "does not indicate." The majority fails to consider the news articles in the aggregate, ignores the SEC hearings completely, and refuses to consider Cummings' statement as anything other than a (non) allegation of fraud. When the facts are properly viewed, public disclosures abound. The newspaper articles based on CF & I's reports and representations and the CF & I corporate reports (to the extent they were filed with the SEC) contain numerous public disclosures of the purportedly false representations (X). The testimony before the SEC, when coupled with Cummings' statement and the reports of CF & I's burgeoning unfunded pension obligations, suffice as public disclosures of the true facts (Y). The disclosure of both of these elements together should (and did) permit intrepid government investigators, "through the exercise of diligence typical of law enforcement authorities," to discover or deduce the existence of fraud (Z). *United States v. DiSantillo,* 615 F.2d 128, 135 (3d Cir. 1980). I would hold that these numerous public disclosures were sufficient to qualify as a "public disclosure of allegations or transactions." Accordingly, I would hold Rabushka's *qui tam* action barred under § 3730(e)(4)(A), and would affirm the district court on this issue.

The majority's misapplication of *Springfield* is confirmed by a comparison of the facts involved in the instant appeal with those of *Springfield*. As the majority notes, *Springfield* involved the public disclosure of the pay vouchers and telephone records maintained by an arbitrator and obtained through discovery in related litigation. These records revealed that the arbitrator made certain claims for compensation (the false set of facts, or X). Through independent investigation, *Springfield* determined that some of the submitted claims for compensation were the result of the arbitrator's "fraudulent behavior" (*i.e.*, were false, or Y) and brought a *qui tam* action based upon the information disclosed by this investigation. 14 F.3d at 648. The *Springfield* court makes no mention of any governmental investigation. In contrast, Rabushka makes his claims based upon newspaper articles, corporate reports and disclosures to the SEC and bankruptcy court. There is no information provided by any independent investigation by Rabushka. Indeed, there is no indication that Rabushka has even conducted any such investigation. However, the PBGC has initiated an investigation. In sum, the public disclosures in *Springfield* consisted of only one element of a fraudulent transaction, and *Springfield* supplied the other elements through independent investigation while the government stood idly by. The public disclosures in Rabushka's appeal consist of two elements of fraud, and were sufficient to alert the PBGC to the need for an investigation, while Rabushka contributed nothing.[13]

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[13] *Cooper v. Blue Cross & Blue Shield of Fla.*, 19 F.3d 562 (11th Cir. 1994) (per curiam), upon which the majority relies, may be similarly distinguished. In *Cooper*, the relator conducted extensive investigation on his own and goaded the government for action. He filed a *qui tam* action only when the government declined to take any action. This short per curiam opinion is far from rich in facts, but those that are given paint a picture that is completely different from the facts involved in the instant appeal. It is not clear from the *Cooper* opinion whether the false facts (the BCBSF claims to the government) were publicly disclosed. The only clearly discernable disclosure is

(Footnote 13 continued on next page)

2. The majority focuses too narrowly upon dictum in *Springfield.*

Although the *Springfield* court's conclusion is a correct analysis of the hypothetical posed, the hypothetical is premised upon the assumption that an FCA action requires allegations (and proof) of only two elements, when in fact such an action requires proof of at least three[14] elements: (1) a represented set of facts;

(Footnote 13 continued)

contained in the GAO report, and it is a disclosure of motive from which scienter may be inferred. If only scienter is disclosed, then *Cooper* is completely consistent with *Springfield.* To the extent that *Cooper* may be inconsistent with *Springfield,* I find the *Cooper* opinion that does "not explain its analysis in detail" to be unpersuasive when compared to the detailed analysis of *Springfield.*

It is notable that the panel majority can identify no case in which a *qui tam* relator was permitted to maintain an action in the face of disclosures even remotely as voluminous as those present here. Indeed, several reported cases invoke the jurisdictional bar when confronted with public disclosures considerably less substantial than those made here. *See, e.g., United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322-23 (2d Cir. 1992) (disclosures by FBI agents during execution of search warrant constituted public disclosure of allegations); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins.*, 944 F.2d 1149, 1157 (3d Cir. 1991) (disclosure of single memorandum describing allegedly fraudulent billing practice (but not its false or fraudulent nature) obtained through discovery in unrelated litigation constituted public disclosure of allegations or transactions); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1157-58 (2d Cir.) (discovery materials indicating that engineering change was made to Black Hawk helicopter (*i.e.*, the false state of affairs) constituted public disclosure of allegations or transactions), *cert. denied,* ____ U.S. ____, 113 S. Ct. 2962, 125 L.Ed.2d 663 (1993); *Cooper,* 19 F.3d at 567 (mention of defendant BCBSF during House-subcommittee hearing on fraud constituted public disclosure of allegations).

[14] In order to recover damages, a *qui tam* relator must also prove a fourth element, damages. *See United States v. Lawson,* 522 F. Supp. 746 (D.N.J. 1981) (construing 31 U.S.C. § 231, a predecessor to 31 U.S.C. § 3729). Because this element is subsumed by the others (*i.e.*, if the false representations and the true facts are proven, the amount of damages may, at least in theory, be determined), it will not be separately considered.

(2) a true set of facts that differs from the represented facts (*i.e.*, falsity of the representations); and (3) scienter.[15] Although not considered by the *Springfield* court, scienter is a required element of an FCA violation. *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) (noting requirement of knowledge in § 3729(a) (l), (a) (2) & (a) (7)); *see* 31 U.S.C. § 3729(b). When the hypothetical is revised to reflect all the required elements of an FCA violation, it becomes: W (scienter) + X (false representations) + Y (true facts) = Z (fraud). Recognition that the *Springfield* hypothetical omits scienter is the key to properly interpreting the dictum in *Springfield* and to recognizing the majority's error.

I would hold that the disclosures in the various newspaper articles and before the SEC and the bankruptcy court constituted public disclosures of both the true state of affairs, as demonstrated above, and scienter, as demonstrated below. Accordingly, I would hold that because there has been a public disclosure of all three elements of an FCA violation, the jurisdictional bar of § 3730(e)(4)(A) removes federal court jurisdiction over Rabushka's *qui tam* action. However, even if the majority's conclusion that there was no public disclosure of the true facts is accepted, the disclosures in the various newspaper articles and before the SEC and the bankruptcy court constituted public disclosures of scienter. Thus, even if the majority's position is adopted, there has been a disclosure of the false representations

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[15] Each of the provisions of § 3729(a) contains a specific scienter requirement. Subsections (1), (2), (6) and (7) require knowledge. Subsections (4) and (5) require a specific intent to defraud. Subsection (3), upon which this action is based, is addressed to conspiracies to defraud. Such a conspiracy requires a purpose to defraud (*i.e.*, specific intent). *Boese, Qui Tam Actions* 2-19; *see In re North Dakota Personal Injury Asbestos Litig. No. 1*, 737 F. Supp. 1087, 1095 (D.N.D. 1990); 16 Am.Jur.2d *Conspiracy* § 49; *cf* 16 Am.Jur.2d *Conspiracy* §§ 13-14 (intent necessary for criminal conspiracy and such intent presupposes knowledge). All of these mental states will be referred to generically as "scienter."

(X) and of scienter (W). I would hold that a disclosure of two of the three elements is sufficient to constitute a public disclosure of "allegations or transactions." Accordingly, I would affirm the district court.

"A common method for establishing a strong inference of scienter is to allege facts showing a motive for committing fraud and a clear opportunity for doing so." *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 50 (2d Cir. 1987), *cert. denied*, 484 U.S. 1005, 108 S.Ct. 698, 98 L.Ed.2d 650 (1988), *other aspects overruled*, 865 F.2d 1370 (1989); *see Patrick Carter Assocs. v. Rent Stabilization Ass'n of N.Y.C.*, 1990 WL 195993 (S.D.N.Y. Nov. 28, 1990); *Wolf Office Equip. Corp. v. Wang Lab.*, 1988 WL 143119 (S.D.N.Y. Dec. 30, 1988); 37 Am.Jur.2d *Fraud* § 19 (although not legally necessary, "it is said to be a significant fact tending to show fraud that a representor profited by his representation" and "the fact that he did derive a benefit may serve to strengthen the [fraud] plaintiff's case on the evidence"). Here, the public disclosures clearly amount to a showing that Crane had a motive to commit fraud, and thus provide sufficient evidence of scienter that (when combined with the public disclosures of the representations and the other "abnormalities" surrounding this case) government investigators should have been (and in fact were) alerted to the need for an investigation.

The transcripts of the SEC hearings fairly exude motive for fraud. Benjamin R. Jacobson testified that "we (Crane) were concerned that the possibilities that CF [&] I would go bankrupt, and what claims and liabilities might kick back on the new holders of Crane shares." Dwight Church Minton testified that T.M. Evans thought it desirable to spin CF & I off and that it was questionable "whether CF & I could last any length of time as an independent company, and should it fail to operate as an independent company for some length of time ... it could result in liabilities coming back to Crane, which would be an extremely

serious matter." T.M. Evans testified that as a result of CF & I's poor financial condition, the effects of a CF & I bankruptcy were of great concern to Crane when it considered whether to spin CF & I off, concluding that "[i]t's obvious, if [CF & I] was a subsidiary to Crane, [Crane] would be li[able]. The only thing is if [Crane] got rid of [CF & I], [Crane] wouldn't be li[able] if [CF & I] stayed a certain time." Thus, "[i]t was certainly to Crane's advantage to spin it off promptly." These and other similar statements clearly indicate that Crane had a motive to conceal facts that would inhibit the spin-off so that the spin-off could be consummated quickly. A quick spin-off was necessary to provide enough time before CF & I's anticipated bankruptcy that Crane would not be liable for CF & I's unfunded pension obligations.

Thus, I conclude that the public disclosures were sufficient to disclose the represented state of affairs (X) and motive and opportunity, from which a strong inference of scienter (W) arises. The combination of these two of the three elements of a fraudulent transaction were sufficient to place the government on notice of the need for an investigation, and were therefore sufficient to constitute "allegations or transactions" under § 3730(e)(4)(A).

This view of the jurisdictional bar is consistent with the facts and rationale of *Springfield*. *Springfield* states:

> Turning then to the case at hand, we conclude that the information disclosed via discovery cannot rise to the level of "allegations or transactions" so as to prevent the exercise of jurisdiction. Fraud requires recognition of two elements: a misrepresented state of facts *and* a true state of facts. *The presence of one or the other in the public domain, but not both, cannot be expected to set Government investigators on the trail of fraud.* ... Knowledge of the allegedly misrepresented state of affairs—which does not necessar-

> ily entail knowledge of the fact of misrepresentation—is *always* in the possession of the government.

14 F.3d at 655-56 (emphasis partially added). *Springfield* thus stands squarely for the proposition that *qui tam* jurisdiction is not defeated by the presence of only one of the elements of an FCA claim. Properly interpreted, it does not stand for the proposition cited by the majority that all three elements of the claim must be disclosed.

The *Springfield* court's holding is based upon the rationale that the jurisdictional bar is designed to prevent *qui tam* actions in cases that the government could pursue. *Qui tam* suits are not necessary where "enough information exists in the public domain to expose the fraudulent transaction (the combination of X and Y), or the allegation of fraud (Z). When either of these conditions is satisfied, the government itself presumably can bring an action under the FCA and there is no place in the enforcement scheme for *qui tam* suits." *Id.* at 654. Such suits, if permitted, would "tend to be suits that the government presumably has chosen not to pursue or which might decrease the government's recovery in suits it has chosen to pursue." *Id.* If the fraudulent transaction is viewed as W + X + Y = Z, and disclosure of X + Y was considered sufficient to bar jurisdiction in *Springfield*, I can see no reason why the disclosure of W + X should not be sufficient to bar jurisdiction in this case.

III. RABUSHKA'S ACTION WAS "BASED UPON" PUBLICLY DISCLOSED ALLEGATIONS OR TRANSACTIONS

Under 31 U.S.C. § 3730(e)(4)(A), a district court is deprived of subject matter jurisdiction over a *qui tam* action only where that action is "based upon the public disclosure of allegations or transactions." The jurisdictional bar applies only if there is a sufficient nexus between the public disclosure of allegations or transactions and the subject matter of the *qui tam* action. The

phrase "based upon," which describes this nexus, has been broadly interpreted by other courts of appeals to mean "based in any part upon." *Precision Co.*, 971 F.2d at 552-53; *Kreindler & Kreindler*, 985 F.2d at 1158; *Doe*, 960 F.2d at 324.

Until the decision in *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir.), *cert. denied*, ____ U.S. ____ 115 S. Ct. 316, 130 L.Ed.2d 278 (1994), there was virtual unanimity among the courts of appeals in interpreting "based upon" in this manner. *Becton* rejected this analysis, and took pains to distinguish its position from that taken by previous courts. *Becton*, 21 F.3d at 1349. I would reject *Becton* for three reasons. First, I find the analysis used to support its interpretation of "based upon" to be unpersuasive. Second, the *Becton* interpretation of "based upon" conflicts with the structure of the FCA. Third, the *Becton* interpretation conflicts with the history and purpose of the FCA.

Becton dismissed prior decisions construing "based upon" to mean "based in any part upon" because "[t]he extent to which a *qui tam* action must be 'based upon' a public disclosure is, of course, distinct from the analytically antecedent question of what it means for an action to be 'based upon' a public disclosure." *Id.* at 1349. Although this distinction is an admirable example of subtle metaphysical analysis, it is simply irrelevant where the issue to be decided is whether an action that relies[16] in part upon public disclosures is "based upon" the disclosures within the meaning of that phrase as used in the FCA. A court is confronted with an action that relies upon a public disclosure, and must decide whether that action is within the FCA's jurisdic-

---

[16] It is not unlikely that the *Becton* court was confused by two different uses of the phrase "based upon." To say that an action is "based upon" a public disclosure in a colloquial sense is not to say that it is "based upon" the disclosure as that term is used in the FCA. In order to minimize this confusion, the term "relies upon" will replace the colloquial use of "based upon," and "based upon" will be used only as it appears in the FCA.

tional bar. *Becton,* perhaps correctly, observes that the question of *whether* an action is "based upon" a disclosure is distinct from, and antecedent to, the question of *how much* an action is "based upon" a disclosure. However, the decisional process requires the court to take the facts as given and apply the statutory language to them. Thus, the court is given an action that *ex hypothesi* relies in part upon a public disclosure, and it must decide *whether* that action is "based upon" the disclosure. (The FCA never calls for the court to make the second determination of *how much* the action is "based upon" the disclosure.) *Becton* bolsters this distinction with an appeal to common sense, but I find this appeal unpersuasive in light of the fact that the common sense of all previous courts of appeals has led to an opposite conclusion. *See, e.g., Precision Co.,* 971 F.2d at 552-53; *Kreindler & Kreindler,* 985 F.2d at 1158; *Doe,* 960 F.2d at 324.

Moreover, the statutory scheme of the FCA provides an additional reason to reject *Becton's* interpretation of "based upon." If the *Becton* interpretation is adopted, the original source provision becomes largely superfluous. Under *Becton,* the jurisdictional bar applies only when the *qui tam* relator has obtained his information solely from the public disclosure. However, if the relator's sole source is the public disclosure, it is impossible for the relator to have independently obtained information, because all the relator's information was obtained solely from the public disclosure. Such an interpretation renders the independent knowledge provision redundant. Where a statute is subject to a reasonable construction that gives effect to all of its provisions, I would decline to adopt a construction that renders one provision a mere redundancy. *Beef Neb, Inc. v. United States,* 807 F.2d 712, 717 (8th Cir. 1987); *Darling v. Bowen,* 878 F.2d 1069, 1076 (8th Cir. 1989), *cert. denied,* 494 U.S. 1066, 110 S.Ct. 1782, 108 L.Ed.2d 783 (1990).

Finally, as discussed above, the purpose of the FCA reinforces the pre-*Becton* interpretation. When the government has all the

information necessary to initiate an investigation, and the relator possesses only redundant information, there is simply no need for *qui tam* actions as a means of enforcement. *Becton* would permit a *qui tam* action in a case where the government already possessed all the evidence it required to take a case to trial, provided that the relator's *qui tam* action was not based solely upon the disclosures from which the government derived its evidence. The relator need only supply a trivial bit of new evidence to avoid the jurisdictional bar under *Becton*. Allowance of *qui tam* actions in this context merely frustrates the congressional intent.

For these reasons, I reject *Becton's* interpretation of "based upon." I would hold that Rabushka's *qui tam* action is "based upon" the publicly disclosed allegations or transactions, and therefore the district court had no jurisdiction over the action unless Rabushka is an original source. Because Rabushka has conceded that he is not an original source,[17] I would affirm the district court.

IV. DENIAL OF RABUSHKA'S MOTION TO AMEND THE COMPLAINTS WAS NOT AN ABUSE OF DISCRETION

The standard of review for a denial of leave to amend a complaint is whether the trial court abused its discretion. *Harbor Ins. Co. v. Essman*, 918 F.2d 734, 739 (8th Cir. 1990). Rabushka's motion for leave to amend was made after the first complaint was dismissed, and the amendment was intended merely to modify the theory of liability, not to change any jurisdictional allegations. App. at 333 (Plaintiff's Motion for Leave to Amend the Complaint). Because Rabushka's complaint had already been dismissed for lack of subject matter jurisdiction, and the proposed amendment did not remedy the jurisdictional deficiency,

[17] For this reason, I would also deny Rabushka's eleventh-hour motion to amend his complaint to cure the jurisdictional defect.

the denial of leave to amend was not an abuse of discretion. *Harbor Ins. Co.*, 918 F.2d at 739; *Vitale v. Aetna Casualty & Sur. Co.*, 814 F.2d 1242, 1252 (8th Cir. 1987); *Niagra of Wis. Paper Co. v. Paper Indus. Union-Management Fund*, 800 F.2d 742, 749 (8th Cir. 1986). Accordingly, I would affirm the district court in this regard as well.

UNITED STATES DISTRICT COURT
EASTERN DIVISION OF MISSOURI
EASTERN DIVISION

No. 91-420-C-7
Consolidated with 4:92CV514

UNITED STATES OF AMERICA ex rel.
STANLEY RABUSHKA
and STANLEY RABUSHKA,
Plaintiffs,
v.
CRANE CO. and CF & I STEEL CORPORATION,
Defendants.

MEMORANDUM AND ORDER

This matter is before the Court on (1) Plaintiff's Motion for Order Directing Clerk to Issue Summons, filed September 23, 1992; (2) Crane Co.'s Motion to Stay Discovery, filed October 20, 1992; (3) Crane Co.'s Motion to Dismiss, filed November 3, 1992; and (4) Plaintiff's Motion to Suspend Action of Plaintiff's Motion for Order Directing Clerk to Issue Summons, filed March 2, 1993.

Plaintiff Stanley Rabushka ("Rabushka") on behalf of the United States brings this action against Defendants Crane Co. ("Crane") and CF & I Steel Corporation ("CF & I") under the False Claims Act ("FCA") 7 31 U.S.C. § 3729 *et seq.*, as amended in 1986.[1]

Rabushka alleges that Crane and CF & I conspired to defraud the United States by effecting a corporate reorganization in 1985

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[1] Specifically, Rabushka contends that Crane and CF&I violated § 3729 (a)(3) of the FCA, which provides in pertinent part:

(Footnote 1 continued on next page)

in which Crane spunoff of its subsidiary, CF & I. Plaintiff contends that the purpose of the spinoff was to insulate Crane from liability for CF & I's underfunded pension plan and to shift liability to the Pension Benefit Guaranty Corporation ("PBGC"). (Compl. ¶¶ 7 and 16.)

Upon the government's motion, this action was previously dismissed as premature because CF & I's pension fund had not been terminated; termination is a necessary condition to the existence of a claim under the FCA. (Memorandum and Order, Oct. 3, 1991.) The Order dismissing the action was appealed. (Notice of Appeal, Oct. 30, 1991.) Because CF & I's pension plan was terminated while the appeal was pending, the Court of Appeals for the Eighth Circuit dismissed the appeal and remanded the matter to this Court. (8th Cir. Order, April 21, 1992.)

This Court is a court of limited jurisdiction and as such the Court must review each complaint to determine if subject matter jurisdiction exists. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986). For this reason, the Court first addresses the motion to dismiss for lack of jurisdiction over the subject matter.

(Footnote 1 continued)

(a)Liability for certain acts. — Any person who...

. . . .

(3)conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

. . . .

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . .

31 U.S.C. § 3729 (a)(3) (Supp. 1993).

Subject Matter Jurisdiction

The FCA provides penalties for persons who knowingly make false claims for money or property upon the United States, or cause to be made, or who submit false information in support of such claims. 31 U.S.C. § 3729 (Supp. 1993). Civil actions may be brought by the Government or, in certain circumstances, by a private citizen ("a *qui tam* plaintiff") on behalf of the Government. *Id.* § 3730.

A court lacks subject matter jurisdiction if an FCA action is based upon the public disclosure of allegations or transactions by the news media, among other sources, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. § 3730(e)(4). Section 3730(e)(4) provides:

> (e) Certain actions barred. —
>
> . . . .
>
> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

Id. The contours of § 3730(e)(4) have not been explored by the Court of Appeals for the Eighth Circuit and some of the specific issues raised here do not appear to have been addressed by any other courts.

In accordance with the jurisdictional requisites contained in § 3730(e)(4), this Court must determine (i) whether there has been a "public disclosure of allegations or transactions;" (ii) if so, whether the *qui tam* plaintiff's suit is "based upon" the public disclosure; and (iii) if so, whether the *qui tam* plaintiff is an "original source" of the information. *See United States ex rel. Lavalley v. First Nat'l Bank of Boston*, 707 F.Supp. 1351, 1366 (D.Mass 1988).

(i) public disclosure of allegations or transactions

Crane contends that the allegations and transactions underlying Rabushka's Complaint were exhaustively disclosed prior to Rabushka's filing of this suit. In support of its contention, Crane submits eighteen news articles, excerpts from annual reports and proxy statements, and a portion of a transcript of a hearing in bankruptcy court.

In response, Rabushka raises two arguments. First, Rabushka states that "Crane has failed to point to a single instance of public disclosure of either the allegation of fraud which plaintiff has now made or the information from which that conclusion could be drawn." Second, Rabushka argues that the public disclosure of the CF & I spinoff is not a public disclosure within the meaning of § 3730(e)(4) because the mere disclosure of the transaction did not reveal any fraud. Rabushka asserts that "[t]he requisite 'allegation or transaction' is an allegation of fraud or a patently fraudulent transaction." (Pl.'s Memorandum in Opp. to Motion to Dismiss, p.8.)

The language of the FCA does not support Rabushka's assertion that "allegation or transaction" means only "allegation of

fraud or a patently fraudulent transaction."[2] The plain language of § 3730(e)(4) of the FCA calls for judicial inquiry into public disclosure of allegations *or* transactions. While the word "allegation" may imply an allegation of fraud, "transaction" means just that, "an act of transacting or conducting any business." *See* Blacks Law Dictionary 1341 (5th Ed. 1979).

The case law, albeit limited, also does not support Rabushka's assertion that "allegation or transaction" means "allegation of fraud or a patently fraudulent transaction." In support of its position, Rabushka cites *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992), which states "[n]o doubt when courts speak of 'publicly disclosed information,' they mean both the allegation of fraud and all of the information proving the allegation." *Id.* at 1418. *Wang's* discussion is inapposite to the issue before this Court because *Wang* concerns the phrase "information on which the allegations are based" found in the original source provision in § 3730(e)(4)(B), rather than the phrase "allegations or transactions" in § 3730(e)(4)(A).

Furthermore, the Courts of Appeals for other circuits have construed "public disclosure of allegations or transactions" broadly. For example, the Court of Appeals for the Second Circuit stated "[w]e believe that if the information on which a *qui tam* suit is based is in the public domain, and the *qui tam* plaintiff was not a source of that information, then the suit is barred." *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990). *See also United States ex rel. John Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992) (information concerning defense contractor's billing practices was in public domain because contractor's employees were questioned by

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[2] "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must be ordinarily regarded as conclusive." *Consumer Prod. Safety Comm. v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980).

federal agents); *United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1156 (3d Cir. 1991) (information concerning insurance claims which was obtained through civil discovery in prior litigation constituted public disclosure).

Finally, Rabushka's restrictive interpretation of the word "transactions" would thwart one of the goals of the FCA which is to prevent parasitic lawsuits by opportunists seeking renumeration while contributing nothing to the disclosure of the fraud. *See United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, 113 U.S. 1364 (1993); *John Doe*, 960 F.2d at 321; *Stinson*, 944 F.2d at 1154.

The Court concludes that the jurisdictional bar in § 3730(e)(4) applies if the subject transactions have been publicly disclosed, even if allegations of fraud have not specifically been made.

The Court finds that the significant transactions which underlie Rabushka's FCA claim were disclosed in the media prior to Rabushka's filing of this suit. A comparison of the allegations in the Complaint and items available to the public reveals that the subject transactions had been publicly disclosed. Each substantial allegation constituting Rabushka's FCA claim is listed below and is followed in parentheses by corresponding public disclosure:[3]

1) Crane knew of the underfunding of the CF & I's pension plan before the spinoff.
[Def. Exh. 1, p. 13, col. 2; Def. Exh. 3, p. 16.]

2) Crane omitted facts about the extent of the underfunding from its public disclosures.
[Pl. Exh. 1]

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[3] Plaintiffs' Exhibits ("Pl. Exh.") are appended to the Complaint. Defendants' Exhibits ("Def. Exh.") are appended to the Memorandum in Support of Crane Co.'s Motion to Dismiss.

3) Crane effected the spinoff of CF & I.
[Def. Exh. 3, p. 19.]

4) The spinoff resulted in relieving Crane of liability for the CF & I pension plan.
[Def. Exh. 1, p. 1, col. 3.]

5) CF & I discussed its pension plan with PBGC.
[Def. Exh. 1, p. 13, col. 2; Def. Exh. 3, p. 16.]

6) CF & I filed for bankruptcy.
[Def. Exh. 1, p. 12, col. 1.]

7) PBGC would ultimately assume responsibility for CF & I's pension obligations.
[Pl. Exh. 2, p. 2, col. 2.]

The Court concludes that there was public disclosure of the transactions underlying Rabushka's Complaint.

Furthermore, an actual allegation of fraud was essentially made in December 1990 by Frank Cummings, counsel for CF & I. Cummings stated

> In addition, there were what we believe to be miscalculations, putting the kindest possible face on it, by the actuary for this plan who was retained by the former parent of [CF & I], Crane. And those miscalculations — it is a pejorative term. Those calculations which did not display what we believe should have been displayed were not discovered until at or about the time of the spin-off which occurred in 1985.

Def. Exh. 3, p. 16, l. 14 - l. 20.

Rabushka filed suit on February 28, 1991. The news articles, annual reports and proxy statements, and statements of CF & I's counsel indicate that the allegations and transactions which underlie Rabushka's FCA claim were publicly disclosed prior to Rabushka's filing of this suit.

(ii) whether the suit is "based upon" the public disclosure

Because the Court has determined that there was a public disclosure of allegations or transactions, the Court must next determine whether Rabushka's suit is based upon the public disclosure.

Although the Court of Appeals for the Eighth Circuit has not addressed the issue, other Courts of Appeals have held that "based upon" means "based in any part upon," rather than "based solely upon." *See Precision*, 971 F.2d 548, 552-53. *Accord United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, Nos. 91-9288, 91-9380 (2d Cir. Jan. 22, 1993). In *Precision*, the Court of Appeals for the Tenth Circuit reasoned that a restrictive interpretation § 3730(e)(4) where "based upon" is construed as "based in any part upon" was appropriate for three reasons: first, doubts concerning jurisdiction are to be resolved against federal jurisdiction; second, the interpretation is consistent with legislative intent; and third, the interpretation is consistent with practical considerations of judicial economy. *Precision*, 971 F.2d at 552-53. The Court is persuaded by the Tenth Circuit's reasoning and adopts the restrictive interpretation which construes "based upon" to mean "based in any part upon."

Furthermore, at least on Court of Appeals has held that public disclosure of the allegations or transactions divests a district court of jurisdiction regardless of where the *qui tam* plaintiff obtained his or her information. *John Doe*, 960 F.2d at 324. The Court concludes that the Second Circuit's position is sound because "[w]ere it otherwise, parasitic actions would flourish." *Id.*

Because Rabushka's Complaint is based in some part upon publicly disclosed transactions, the Court lacks subject matter jurisdiction over Rabushka's action unless Rabushka is an original source of the information.

(iii) whether the *qui tam* plaintiff is an "original source"

Rabushka concedes that he is not an "original source" of the information concerning Crane and CF & I: "the plaintiff does not contend nor has he ever contended that this Court has subject matter jurisdiction on the original source basis." (Pl.'s Memorandum in Opp. to Motion to Dismiss, p. 1.)

In sum, because Rabushka's *qui tam* action is based upon public disclosures from the news media and other public information, and because Rabushka is not an original source of the information, the Court lacks subject matter jurisdiction over this suit.

ACCORDINGLY,

IT IS HEREBY ORDERED that Crane Co.'s Motion to Dismiss on the basis of lack of subject matter jurisdiction is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Order Directing Clerk to Issue

Summons is **DENIED** as moot.

IT IS FURTHER ORDERED that Crane Co.'s Motion to Stay Discovery is **DENIED** as moot.

IT IS FURTHER ORDERED that Plaintiff's Motion to Suspend Action of Plaintiff's Motion for Order Directing Clerk to Issue Summons is **DENIED** as moot.

Dated this 1st day of June, 1993.

/s/ Jean C. Hamilton
Jean C. Hamilton
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3212EMSL

UNITED STATES OF AMERICA, ETC., et al.,
Appellants,

vs.

CRANE COMPANY,
Appellee.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

The suggestion for rehearing en banc is denied. Judge Bowman, Judge Magill, and Judge Morris Sheppard Arnold would grant the suggestion for rehearing en banc. The petition for rehearing by the panel is also denied.

January 19, 1995

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

31 U.S.C. § 3730(e)(4) provides:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

Supreme Court, U.S.
FILED
MAY 22 1995
CLERK

No. 94-1725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CRANE CO.,
Petitioner,

v.

UNITED STATES OF AMERICA *ex rel.* STANLEY RABUSHKA
and STANLEY RABUSHKA,
Respondents.

In Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Does section 3730(e)(4)(A) of the False Claims Act, which divests district courts of subject matter jurisdiction over actions "based upon the public disclosure of allegations or transactions," bar an action when the alleged "public disclosure" disclosed no fraud?

II

When a district court determines solely on the basis of uncontradicted, documentary evidence that certain statements in that documentary evidence constitute allegations of fraud within the meaning of the False Claims Act, is that decision a finding of fact which a court of appeals should review under the clearly erroneous standard or a question of law which a court of appeals should review de novo?

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No. 94-1725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CRANE CO.,

Petitioner,

v.

UNITED STATES OF AMERICA *ex rel.* STANLEY RABUSHKA and STANLEY RABUSHKA,

Respondents.

In Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent Stanley Rabushka brought this case pursuant to the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. The FCA authorizes any individual to bring suit as a *qui tam* relator on behalf of the United States for frauds perpetrated against it. Rabushka, a former shareholder of Crane Company, has alleged that Crane masterminded and executed a scheme to defraud the federal Pension Benefit Guaranty Corporation ("PBGC") out of hundreds of millions of dollars. Specifically Rabushka has alleged that Crane misrepresented to the PBGC the true amount of unfunded, PBGC-insured pension plan liabilities of its former

subsidiary, CF&I Steel Corporation. CF&I's pension plan was so grossly underfunded that without the financial support of Crane, both the plan and CF&I were doomed to bankruptcy and an inevitable PBGC bailout.

In May 1985, Crane, which then owned 96.3% of the outstanding CF&I stock, divested itself of all ownership in CF&I by distributing its CF&I shares to Crane shareholders. Had the PBGC known of the truly staggering amount of CF&I's unfunded pension liabilities, it would have had no choice but to terminate the pension plan prior to the 1985 spin-off of CF&I, while Crane was still liable for the unfunded liabilities.

Just prior to the 1985 spin-off of CF&I, Crane ensured the success of its fraudulent scheme by hand-picking a new management for the about-to-be independent CF&I—a majority of the new CF&I directors were also members of Crane's board of directors.[1] After the spin-off, Crane and the newly selected CF&I management conspired to conceal Crane's fraud on the PBGC.

Crane schemed to conceal the true amount of underfunding long enough for CF&I plausibly to portray the massive underfunding as the result of post-spin-off events unrelated to Crane. Thus, in the proxy statement in which Crane proposed the spin-off, Crane falsely reported CF&I's unfunded pension plan liabilities to be the manageable sum of $46 million[2] at the end of 1984. Thereafter, the new CF&I directors gradually began to

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[1] In its 1985 proxy statement, Crane declared its intent to vote its 96.3% of CF&I shares in favor of the slate of nominees chosen by Crane. Of that slate of nominees for CF&I's new directors, five served as directors of both Crane and CF&I. Crane's proxy statement explained that the five common directors would constitute a majority of the CF&I board of directors and would "provide for continuity of experienced oversight of the business of CF&I."

[2] CF&I's net worth of $82 million, as reported by Crane in the 1985 proxy statement, would have been far more than sufficient to cover that underfunding.

reveal incrementally greater and greater amounts of the true underfunding: by the end of 1986, CF&I reported the underfunding to be $120 million and, by late 1990, $140 million.

By offering innocent explanations for these purported "increases," CF&I continued to hide the fact that its and Crane's representations to the PBGC were *fraudulent*, even after it could no longer completely hide the true extent of the massive unfunded pension liabilities. For instance, CF&I fraudulently explained the 1986 "increase" as being due to "early retirements," "reduced interest rates," "lower assumed average retirement age of active participants," and "the adoption of new accounting standards." When the PBGC finally terminated the pension plan in 1992 (over a year after Rabushka filed this lawsuit), it reported CF&I's unfunded liabilities to be approximately $270 million, more than five times the amount originally reported by Crane at the time of the spin-off.

Shortly after CF&I filed for bankruptcy in 1990, Rabushka filed this action against Crane and CF&I under seal in accordance with the requirements of the FCA. Reasoning that the PBGC had not yet terminated CF&I's pension plan and had thus not paid any claim, the district court dismissed the suit as premature. That dismissal came even before the district court had lifted the seal or authorized issuance of summonses to the defendants. Therefore, both Crane and CF&I were unaware of the suit at the time of that dismissal.

Rabushka appealed the dismissal. The court of appeals did not continue to treat the case as being under seal. Accordingly, while that appeal was pending, Crane learned of the suit through an article appearing on the front-page of *The New York Times*' Business Section,[3] which described the lawsuit and Rabushka's

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[3] DIANNA B. HENRIQUES, *A NAGGING PENSION QUESTION THREATENS CRANE*, N.Y. TIMES, March 29, 1992, section 3, p. 1.

allegations against Crane. Crane scrambled to intervene in the appeal, directly blaming — in Crane's own words — the "*premature public disclosure*" of Rabushka's allegations for a decline of over $60 million in the value of Crane's stock the day following the public disclosure of this case in *The New York Times*. Crane explained that the $60 million decline occurred on a trading volume which exceeded that for the entire previous week. In support of its motion to intervene, Crane bitterly complained that it and its shareholders would continue to suffer "from the uncertainty created in the marketplace by the publicity surrounding this case and they will continue to suffer until this cloud has been removed."

Meanwhile, the PBGC terminated CF&I's pension plan, rendering the appeal moot. The Eighth Circuit remanded the case to the district court, which then authorized issuance of summons to Crane. After being served, Crane responded to the complaint with a motion to dismiss for lack of subject matter jurisdiction based on section 3730(e)(4)(A) of the FCA, which divests district courts of subject matter jurisdiction over *qui tam* suits "based upon the public disclosure of allegations or transactions in a . . . civil . . . hearing . . . or from the news media." Notwithstanding the fact that only months before it had insisted in the court of appeals that Rabushka's allegations had been "prematurely publicly disclosed," Crane argued the diametric opposite in the district court: that Rabushka's allegations were a "rehash" of old news, a mere "second toot."

Rabushka readily acknowledged that the public disclosures to which Crane pointed — several newspaper articles and a statement made by CF&I's attorney in CF&I's bankruptcy proceedings — were, indeed, public disclosures. Rabushka pointed out, however, that because those public disclosures revealed no fraud, they were not "public disclosures" of "allegations or transactions" within the meaning of the FCA. The district court agreed with Rabushka that the word "allegation" means an

allegation of fraud, but the court disagreed that a transaction within the meaning of the FCA had to reveal the defendant's fraud: "'transaction' means just that, 'an act of transacting or conducting any business.'" Appendix to Crane's Petition (hereinafter "App."). at 45B (quoting BLACK'S LAW DICTIONARY at 1341 (5th ed. 1979)). Holding that Rabushka's suit was based on transactions that had been publicly disclosed — without any regard for whether those transactions revealed Crane's fraud — the district court agreed with Crane that Rabushka's suit was barred by section 3730(e)(4)(A). In addition, the court held that the statement made by CF&I's bankruptcy attorney was "essentially" an allegation of fraud. App. at 47B. The district court therefore dismissed the case for lack of subject matter jurisdiction.

The Eighth Circuit unanimously concluded that the district court's interpretation of section 3730(e)(4)(A) was overly broad.[4] On the application of the law to the undisputed facts of the case, however, the panel split. The panel majority first held that CF&I's attorney's statement did not constitute an allegation of fraud within the meaning of the FCA. The court also held that a "transaction" within the meaning of section 3730(e)(4)(A) must reveal a defendant's fraud, unlike any of the transactions relied upon by Crane and the district court. Accordingly, the court held that section 3730(e)(4)(A)'s jurisdictional bar did not apply, reversed the district court's dismissal, and thereafter denied both Crane's petition for rehearing and suggestion for rehearing en banc.

SUMMARY OF ARGUMENT

Although Crane claims that the Eighth Circuit's decision conflicts with the decisions of five other circuits, no such conflict

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[4] Even the dissenting judge "agree[d] with the majority that the district court's application of the jurisdictional bar whenever there is disclosure of the 'subject transactions' was too broad." App. at 10A n.3.

exists. In actuality the Eighth Circuit cited two of those decisions with approval and expressly adopted the holding of a third, as Crane itself acknowledges in its Petition. The court of appeals neither expressly nor implicitly departed from the holding of any federal court of appeals, and Crane's claim to the contrary is wholly contrived.

In addition, Crane claims that the court of appeals disregarded factual findings of the district court. That is patently false. The district court made no findings of fact because, as Crane itself has admitted in its Petition, "the evidence presented by Crane was documentary and not contradicted in any material respect."[5] The only issue was whether the "allegations and transactions" which Crane claimed bar this suit constituted "allegations or transactions" within the meaning of the False Claims Act. It was this point of law upon which the district court and the court of appeals disagreed, a legal issue which the court of appeals was obligated to review de novo.

The decision below was a straightforward application of the plain and unambiguous language of the FCA, and it does not conflict with the decision of any other federal court of appeals or of this Court. Accordingly, there is no question of law at issue that justifies the grant of a writ of certiorari in this case.

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[5] Crane's Petition at 13.

ARGUMENT

I. The Eighth Circuit's holding, that an "allegation or transaction" within the meaning of section 3730(e)(4)(A) of the False Claims Act must reveal the defendant's fraud against the government, is dictated by the plain language of the statute, completely supported by the legislative history, and absolutely consistent with the decision of every federal court of appeals to have addressed the issue

The FCA includes a *qui tam*[6] provision which broadly grants "a person" the right to "bring a civil action" for frauds perpetrated against the federal government. 31 U.S.C § 3730(a). Subsection 3730(e)(4)(A), however, jurisdictionally bars "an action under this section based upon the public disclosure of allegations or transactions in a . . . civil . . . hearing . . . or from the news media."[7] The gravamen of every FCA violation is getting the government to pay a "false or fraudulent claim."[8] Therefore, the only "allegations or transactions" which can serve as the basis of an FCA suit are ones which reveal that a false or fraudulent claim has been submitted to the government for payment or that the government has otherwise been defrauded of money or property. *See* 31 U.S.C. §3729(a).

Because an FCA action can never be "based upon" an allegation or transaction which does not constitute fraud against the

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[6] "*Qui tam* is an abbreviation for *qui tam pro domino rege quam pro seipso*, which means 'he who as much for the king as for himself.'" *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 647 n.1 (D.C. Cir. 1994) (quoting JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 1-6 (1993)).

[7] However, if the *qui tam* relator qualifies as an "original source," his suit is not barred even if it *is* "based upon the public disclosure of allegations or transactions" which have revealed the fraud. 31 U.S.C. §§ 3730(e)(4)(A)-(B).

[8] *See* 31 U.S.C. §§ 3729(a)(1)-(7).

government, it naturally follows that section 3730(e)(4)(A)'s jurisdictional bar is triggered only by allegations or transactions which reveal a fraud against the government. The Eighth Circuit's holding to that effect is nothing more than a straightforward application of section 3730(e)(4)(A)'s plain language.

The Eighth Circuit's holding is also abundantly supported by the legislative history to section 3730(e)(4)(A) and the case law interpreting it. "One theme recurring through the legislative history . . . is the intent to encourage persons with first-hand *knowledge of fraudulent misconduct* to report fraud." *United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1153 (3d Cir. 1991) (emphasis added). "The purpose of the *qui tam* provisions of the False Claims Act is to encourage private individuals who are *aware of fraud* being perpetrated against the Government to bring such information forward." H.R. REP. NO. 660, 99th Cong. 2d Sess. 22 (1986) (*quoted in United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990)) (emphasis added). The Senate Report explained that "changes [in the *qui tam* provisions were] necessary to halt the so-called 'conspiracy of silence' that has allowed *fraud against the government* to flourish." S. REP. No. 345, 99th Cong., 2d Sess. (1986) 6 (emphasis added), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5271.[9]

The first and only other circuit ever to address whether a publicly disclosed "allegation or transaction" must reveal the defendant's fraud, was the District of Columbia Circuit in *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). That court held that "*qui tam* actions are barred only when enough information exists in the public domain to expose the fraudulent transaction . . . or the allegation of fraud." *Id.* at 654. "Many potentially valuable *qui tam suits* would be aborted by a reading of the jurisdictional provision that barred

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[9]Hereinafter "Senate Report." Page references will be to the U.S.C.C.A.N.

suits when the only publicly disclosed information was itself innocuous." *Id.*

Demonstrating its own misunderstanding of the jurisdictional bar, and of *Springfield*'s interpretation of it, Crane observes that "[i]ronically, under the [Eighth Circuit's] interpretation, the more flagrant its fraud and more bereft of innocent explanations for its conduct, the more likely a defendant is to escape a *qui tam* action . . . ."[10] That is precisely correct. As the *Springfield* court explained, once the fraud has been publicly disclosed, "there is little need for *qui tam* actions, which would tend to be suits that the government presumably had chosen not to pursue or which might decrease the government's recovery in suits it has chosen to pursue." *Id.*

Only two courts have ever held that the jurisdictional bar can be triggered by "allegations or transactions" which do not reveal fraud against the government: the district court in *Springfield*, which the D.C. Circuit reversed, and the district court in the present case, which the Eighth Circuit reversed. By holding that the jurisdictional bar is triggered "only when specific allegations of fraud or the vital ingredients to a fraudulent transaction exist in the public eye," *Springfield*, 14 F.3d at 657, the Eighth and D.C. Circuits have simply held expressly what every other court has apparently considered to be self-evident.

Crane claims that the Eighth Circuit's decision "plainly conflicts" with the rulings of five other circuits,[11] yet Crane fails to

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[10] Crane's Petition at 10 note 9.

[11] Those five decisions from other circuits are: *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992); *United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149 (3d Cir. 1991); *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548 (10th Cir. 1992); *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992); and *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994).

explain that supposed conflict. In fact, no such conflict exists. The Eighth Circuit actually cited with approval two of the supposedly conflicting decisions, *Koch* and *Stinson*. App. at 3A. More importantly, unlike the present case, four of those cases — *Doe, Stinson, Koch* and *Wang* — did not even involve any dispute about whether the "allegation or transaction" revealed the defendants' frauds. Rather, the issue in those cases was whether the allegations or transactions at issue had been "publicly disclosed." That was never an issue in the present case because the district court relied only upon items which Rabushka acknowledged had been publicly disclosed. Thus, there is simply no merit to Crane's claim of conflict between the Eighth Circuit and the Second, Third, Ninth and Tenth Circuits.[12]

Crane's claim of discord between the Eighth Circuit's decision in this case and the D.C. Circuit's decision in *Springfield* (the fifth of the five cases) is even more incomprehensible and meritless. Despite this claim of conflict, Crane grudgingly (and condescendingly) admits that "[t]he court of appeals adopted

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[12] It is quite clear that each of the other courts took for granted that "allegations or transactions" would have to reveal fraud against the government. In *Doe*, for instance, the Second Circuit wrote that "[p]ublic disclosure of the allegations upon which the *qui tam* complaint rests is the bedrock of § 3730(e)(4)(A)'s jurisdictional bar. We have recently stated that *allegations of fraud* are publicly disclosed when they are placed in the 'public domain.'" 960 F.2d at 322 (emphasis added). In *Stinson*, the Third Circuit wrote that "because section 3730(e)(4) does not bar a *qui tam* action unless the action is based upon publicly disclosed 'allegations or transactions,' nothing contained here would bar suit by someone who learned *of the fraud* from an insider, if the information had not yet been publicly disclosed." 944 F.2d at 1161 (emphasis added). And in *Koch*, the court noted that the purpose of the jurisdictional bar was to curtail *qui tam* suits "by opportunists attempting to capitalize on public information without seriously contributing *to the disclosure of the fraud.*" 971 F.2d at 552. Likewise, in *Wang*, the Ninth Circuit wrote that the jurisdictional bar applies to "'those who come forward *after* public disclosure of possible False Claims Act violations[.]'" 975 F.2d at 1419.

what it understood to be the reasoning of [*Springfield*]."[13] Crane's discussion of this so-called conflict with *Springfield* exposes Crane's true criticism of the Eighth Circuit's decision, which is that, in Crane's opinion, the court of appeals "misapplied *Springfield* in this case."[14] Crane attempts to transform this alleged "contrast" between the facts of *Springfield* and "the facts in this case"[15] into a conflict between the two circuits. The Eighth Circuit's repeated citation to, quotation of and agreement with *Springfield* debunks Crane's claim of a conflict between the circuits regarding the proper interpretation of section 3730(e)(4)(A).

The 1986 amendments to the FCA broadened qui tam jurisdiction

Crane also attempts to portray the Eighth Circuit's decision as being at odds with the long history of the FCA. Although Crane argues that "[s]ince its enactment in 1863, the FCA has barred a *qui tam* action whenever the government had prior inquiry notice of the potential fraud,"[16] the fact is that from 1863 to 1943 plaintiffs could "bring[] suits based exclusively on information that was already in the government's possession." *Springfield*, 14 F.3d at 649. There was no jurisdictional bar of any kind to *qui tam* suits during that period. Indeed, in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), this Court held that a *qui tam* relator who had merely copied a federal criminal indictment and converted it into a civil FCA *qui tam* complaint was not barred under the Act from doing so. The decision provoked Congress into "restrict[ing] the universe of litigants who could avail themselves of the FCA's *qui tam* provisions." *United States ex rel. S. Prawer and Co. v. Fleet Bank*, 24 F.3d 320, 325

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[13] Crane's Petition at 7.

[14] Crane's Petition at 8.

[15] Crane's Petition at 9.

[16] Crane's Petition at 11.

(1st Cir. 1994). "[T]he final 1943 legislation precluded all *qui tam* actions 'based on evidence or information the Government had when the action was brought.'" *Id.* (quoting 31 U.S.C. § 3730(b)(4) (repealed 1986)).

"Once again, the passage of time revealed that Congress, in its attempt to evade Scylla, had steered precipitously close to Charybdis." *Springfield*, 14 F.3d at 650. "*Qui tam* actions under the FCA had gone in forty years from unrestrained profiteering to a flaccid enforcement tool." *Doe*, 960 F.2d at 321. Congress recognized that "the most serious problem plaguing effective enforcement is a lack of resources on the part of the Federal enforcement agencies." Senate Report at 5272. "Allegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient." *Id.* Congress meant to cure this "most serious problem" by "encourag[ing] assistance from the private citizenry" in the form of whistleblower suits. *Id.* at 5273.

The legislative history thus puts the lie to Crane's unsupported claims that the 1986 amendments "restricted jurisdiction by barring suits . . . whenever the government was on constructive inquiry notice of possible fraud," that "Congress [in 1986] elected to constrain *qui tam* jurisdiction," and that "[t]he powerful enforcement arms of today's government do not require the 10,000 attorneys general which the Lincoln administration required."[17] To the contrary, Congress, "[c]oncerned about 'sophisticated and widespread fraud' depleting the national fisc, . . . concluded that 'only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds.'" *Springfield*, 14 F.3d at 650-51 (footnote omitted) (quoting Senate Report at 5266-67). "As one means of encouraging private citizens to expose fraud, Congress repealed

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[17] Crane's Petition at 11, 12.

the 'government knowledge' jurisdictional bar to *qui tam* actions . . . and enacted *narrowly circumscribed exceptions to qui tam jurisdiction*." *Doe*, 960 F.2d at 321-22 (emphasis added). "In part, the 1986 amendments were 'aimed at correcting restrictive [court] interpretations of the act's . . . *qui tam* jurisdiction' provisions." *Wang*, 975 F.2d at 1419 (quoting the Senate Report at 5269).

Thus, the Eighth Circuit correctly applied *Springfield*'s holding that section 3730(e)(4)(A) is triggered only when "the essential elements exposing the transaction as fraudulent . . . [are] publicly disclosed." App. at 8A (citing *Springfield*, 14 F.3d at 655). Even prior to the 1986 amendments, when the FCA barred *qui tam* suits "based upon evidence or information in the possession of the United States," the mere fact that the government might have had in its possession "some information related to an allegedly false claim [did] not mean that suit under the Act is barred . . . ." *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1377 (D.C. Cir. 1981). Rather, the information in the government's possession had to be "'sufficient to enable it adequately to investigate the case and to make a decision whether to prosecute'" or "at least [sufficient to] have alerted law-enforcement authorities to the likelihood of wrongdoing . . . ." *Id.* (quoting *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 674 (9th Cir. 1978)). *A fortiori*, under the present and broader *qui tam* provisions, a public disclosure must at least, as the Eighth Circuit correctly held, "raise a reasonable inference of fraud" against the government, in order to trigger the jurisdictional bar.

The PBGC's investigation was not prompted by any alleged "public disclosure"

Crane belatedly and falsely claims for the first time in its present Petition that there was in this case "ample public information . . . to alert the PBGC to the likelihood of the false claim

alleged."[18] Crane well knows that this assertion is simply not true and lacks any shred of support in the record. The *only* evidence in the record is that *other individuals*—not public disclosures — had privately alerted the PBGC to Crane's fraud; there is not one scintilla of evidence in this case that the PBGC was aware of or acted upon any alleged public disclosures.[19]

The depositions of Crane's officers taken by the SEC in the course of an unrelated insider-trading investigation did not reveal Crane's fraud

Crane's assertion that the transcripts of depositions taken by the SEC in an unrelated insider-trading investigation were "public disclosures" is wrong. Even the district court did not rely upon the SEC depositions in its dismissal of this case. The mere fact that those deposition transcripts might have been theoretically available to the public "via a Freedom of Information Act request," as Crane alleges without the benefit of any evidentiary support,[20] does not mean that those transcripts have been publicly disclosed within the meaning of the FCA. The D.C. Circuit directly addressed this issue in *Springfield*. When materials are "only *theoretically* available upon the public's request," those materials "are not yet in the public eye" and do not trigger section 3730(e)(4)(A)'s public disclosure bar. 14 F.3d at 652-53.

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[18] Crane's Petition at 7.

[19] Crane apparently believes that Judge Magill's dissenting opinion in this case provides sufficient cover for Crane to make this outrageously deceitful claim. Judge Magill erroneously believed that one or more public disclosures had spurred a PBGC investigation of Crane. App. at 30A. Judge Magill made this mistaken assertion without any citation to any portion of the record. Even Crane had not taken this position in either the district court nor in the court of appeals, undoubtedly because there is absolutely no evidence which supports the claim.

[20] *See* Crane's Petition at 4 note 1.

More importantly, and not surprisingly, Crane's officers most certainly did not reveal their fraud on the PBGC during their SEC depositions. The SEC transcripts of those depositions — which Crane hardly mentioned in its brief in the court of appeals— simply show that Crane wanted to divest itself of ownership of CF&I because of its pension problems. Nowhere do the transcripts so much as hint that Crane had perpetrated or even considered perpetrating a fraud in order to get rid of CF&I. If, as Crane so adamantly insists, it committed no fraud, why would its own officers needlessly and recklessly jeopardize their company and their livelihoods, not to mention seriously risking criminal prosecution, by making such unfounded allegations? The answer is simple. Crane's officers did not reveal Crane's fraud in their SEC depositions, and Crane's claim to the contrary is not only false, it is entirely preposterous.

Crane's own initial reaction to this case after *The New York Times* published Rabushka's allegations is perhaps the most persuasive confirmation of the Eighth Circuit's conclusion that there were no prior "allegations or transactions" that revealed Crane's fraud. In its attempt to intervene in the previous appeal in this case, Crane bitterly complained that the *Times*' article was a "*premature* public disclosure." That claim exposes the utter disingenuousness of Crane's present claim that Rabushka's allegations are a mere "second toot" of prior public disclosures.

If, as Crane argued below, there had already been an "extensively covered," "exhaustively disclosed," "widely published" and "trumpeted" public tooting of Crane's fraud, then why did that supposed "first toot" not have consequences like the more than $60 million drop in the price of Crane's stock which Rabushka's supposed "second toot" caused? Since the alleged "revelations" of Crane's fraud by its own corporate officers in SEC depositions failed to cast a "cloud" over Crane, then how could the "second toot" of a mere shareholder like Rabushka cast a "cloud" over Crane? If there had already been a "widely

published" tooting of Crane's fraud, why did the stock market, as well as Crane, react to Rabushka's "second toot" as if they were hearing such allegations of fraud for the first time? This answer, too, is simple: Rabushka's allegations *were* the first public disclosure of Crane's fraud. Crane's frantic attempt to intervene in the appeal on the grounds that the "premature public disclosure" of Rabushka's allegations was having a "seriously negative impact" on Crane's stock, lays bare Crane's present "public disclosure" argument as nothing short of dissemblance.

The Eighth Circuit's decision in this case is not only consistent with the decisions of every other court of appeals which has interpreted the FCA's jurisdictional bar, it is correct on the facts as well. Accordingly, Crane's Petition for a Writ of Certiorari should be denied.

II. Crane's argument that the majority refused, in defiance of controlling Supreme Court and Eighth Circuit precedent, to review the district court's factual findings under the "clearly erroneous" standard is an absolute red herring, because the facts were undisputed and the only disagreement between the Eighth Circuit and the district court concerns the legal conclusions to be drawn from those undisputed facts

With all the drama — and accuracy — of Chicken Little's claim that the sky was falling, Crane claims that the Eighth Circuit's decision in this case "threatens to erode appellate court deference to the factual findings of trial courts."[21] Crane makes this alarmist claim despite the fact that the district did not make any findings of fact; despite the fact that, on this issue (too), the Eighth Circuit implicitly followed the D.C. Circuit's holding in *Springfield* that a court of appeals must review de novo a district court's "legal conclusions" drawn "from undisputed facts"; and despite the fact that the Eighth Circuit did not write so much as

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[21] Crane's Petition at 15.

a single word which could conceivably be interpreted as authorizing a departure from the "clearly erroneous" standard for reviewing a district court's findings of fact.

The reason that neither the panel majority nor the dissenting judge in this case discussed the applicable standard of review is that *there were no factual disputes for the court to review under any standard.* As Crane itself admitted in its brief in the court of appeals and has reiterated in its Petition, "the evidence presented by Crane was documentary *and not contradicted in any material respect.*"[22] It is well-established that "[w]here material facts are not in dispute, as in this case, [the appellate court will] review the district court's determination that it lacks jurisdiction de novo." *Drevlow v. Lutheran Church, Mo. Synod,* 991 F.2d 468, 470 (8th Cir. 1993). *Accord Springfield,* 14 F.3d at 655; *Herbert v. Nat'l Academy of Sciences,* 974 F.2d 192, 197 (D.C. Cir. 1992); *Ynclan v. Dept. of Air Force,* 943 F.2d 1388, 1390 (5th Cir. 1991); *Osborn v. United States,* 918 F.2d 724, 730 (8th Cir. 1990); *Hohri v. United States,* 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds* 482 U.S. 64 (1987); *Williamson v. Tucker,* 645 F.2d 404, 413 (5th Cir. 1981).

The Court's decision in *Anderson v. City of Bessemer,* 470 U.S. 564 (1985), which Crane has cited, is completely irrelevant to the present case. In *Anderson*, this Court reversed the court of appeals for substituting its own assessment of disputed facts (such as whether a hiring committee was biased against hiring women) for the findings of the district court. To reiterate, there *are* no disputed facts in the present case. Rather, only the legal significance of the documentary evidence is in dispute: do the public disclosures upon which Crane relies constitute "the public disclosure of allegations or transactions" within the meaning of the False Claims Act, even though these disclosures revealed no fraud?

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[22] Crane's Petition at 13.

Even though in *Springfield* the D.C. Circuit addressed the precise issue presented here, that decision, which Crane features so prominently in the first half of its Petition, is conspicuously absent from this section of Crane's Petition. Crane's failure to cite *Springfield* is understandable, given the fact that the D.C. Circuit held in *Springfield* that, when the facts are undisputed, the issue of whether there have been publicly disclosed "allegations or transactions" within the meaning of section 3730(e)(4)(A) is a question of law to be reviewed de novo. 14 F.3d at 655.

In *Springfield*, the *qui tam* relator, Springfield, had obtained a federal arbitrator's (Quinn's) pay vouchers and telephone records through discovery in other litigation. Springfield conducted an investigation and discovered that Quinn "had fraudulently billed the government for days on which he had not actually worked on Springfield's dispute." *Id.* at 648. When Springfield later filed a *qui tam* FCA suit, Quinn moved to dismiss the action under section 3730(e)(4)(A), contending that the "allegations or transactions" underlying Springfield's suit had been publicly disclosed in the other litigation. The district court granted the motion, reasoning that Springfield's suit was "based upon" publicly disclosed information — Quinn's pay vouchers and phone records. *Id.*

As discussed more fully in the first section of this brief, the *Springfield* court held that only publicly disclosed "allegations or transactions" which reveal a defendant's fraud against the government come within the meaning of section 3730(e)(4)(A). Since the parties in *Springfield* did not dispute that the pay vouchers and telephone records had been publicly disclosed, "[r]esolution of the 'allegations or transactions' issue . . . d[id] not turn on 'a determination of fact which only a fact-finder could make but which has not been made." *Id.* at 655. As the court explained, "the district court *assumed without analysis* that the pay vouchers and telephone records disclosed during the discovery *constituted 'allegations or transactions'* within the

meaning of the jurisdictional bar." *Id.* at 653 (emphasis added). The court of appeals was thus required to engage in "independent review of the legal sufficiency of the district court's views and of its application of the law to undisputed facts." *Id.* at 655.

Just as the parties in *Springfield* did not dispute that the pay vouchers and telephone records had been publicly disclosed, the parties in the present case do not dispute that the statement made in a bankruptcy proceeding or that the newspaper articles relied upon by Crane were publicly disclosed. Therefore, just as in *Springfield* "[r]esolution of the 'allegations or transactions' issue . . . d[id] not turn on 'a determination of fact which only a fact-finder could make but which has not been made." Just as the D.C. Circuit had done in *Springfield*, the Eighth Circuit in the present case merely engaged in an "independent review of the legal sufficiency of the district court's views and of its application of the law to undisputed facts." The Eighth Circuit unanimously concluded that the district court's interpretation of section 3730(e)(4)(A)'s jurisdictional bar was "too broad," and the panel majority held, on the basis of the undisputed facts, that none of the public disclosures relied upon by the district court constituted "allegations or transactions" within the meaning of section 3730(e)(4)(A).

Moreover, any conclusion that there had been "allegations or transactions" which revealed Crane's fraud would have, indeed, been "clearly erroneous." The only "allegation" upon which Crane relied was the statement of CF&I's bankruptcy attorney, Frank Cummings, that "there were what we believe to be *miscalculations . . . by the actuary for this plan.*" As the Ninth Circuit has held in an FCA case based on faulty calculations: "Bad math is no fraud." *Wang*, 975 F.2d at 1420. Similarly, Mr. Cumming's allegation of "miscalculations" by an independently retained actuary could not possibly constitute an "allegation" of fraud against Crane within the meaning of the False Claims

Act.[23] The Eighth Circuit's review of the district court's application of the law to Cummings' undisputed statement was clearly appropriate, and its conclusion that the statement did not constitute an "allegation" of fraud within the meaning of section 3730(e)(4)(A) is beyond any rational dispute.

Likewise, the district court, under the mistaken belief that the "subject transactions" need not reveal fraud against the government, expressed no opinion as to whether the "transactions" did reveal any fraud. The Eighth Circuit carefully analyzed the newspaper articles which revealed those "transactions" — *i.e.*, Crane's 1985 spin-off of CF&I, the pension plan's post-spin-off troubles, and CF&I's 1990 bankruptcy filing — which, according to Crane, bar this suit. The court concluded:

> Although CF&I's pension funds were squarely in the public eye prior to Rabushka's suit, the available information cited by Crane reports seemingly legitimate transactions and fails to suggest to the uninitiated reader the state of affairs alleged by Rabushka — that CF&I's pension liability was intentionally understated and that the spinoff was concocted in the hope that Crane would avoid eventual liability. Rabushka was the first to assert that Crane officials knew that the underfunding at the time of the spinoff was

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[23] Crane's myopic focus on Mr. Cummings' statement entirely and indefensibly ignores the context of his remarks. Mr. Cummings also stated:

> The reason for the plan being — and I use the word in quotes — underfunded is the same reason that so many plans in the steel industry end up in this condition. You can be underfunded in this universe in any industry including steel *simply by obeying the law* which, when enacted in 1974, gave you 40 years to amortize the liability. . . . In addition, in the steel industry there are heavily subsidized special early retirement benefits built into the plan which occur when a facility shuts down and people are permanently laid off in connection with that shutdown.

In its full context, Mr. Cummings' statement can in no way constitute an allegation of wrongdoing.

> much greater than reported and that Crane officials were aware that the liability was sufficient to "sink" Crane if Crane was held responsible.

App. at 7A-8A. The Eighth Circuit's review of those articles was just like (and just as correct as) the D.C. Circuit's review of the pay vouchers and telephone records at issue in *Springfield*. In both cases the courts properly reviewed the undisputed, documentary evidence to determine, purely as a matter of law, whether that evidence constituted "'allegations or transactions' within the meaning of the jurisdictional bar." *Springfield*, 14 F.3d at 653. In both cases, the courts properly concluded that the FCA does not bar *qui tam* suits "when the only publicly disclosed information was itself innocuous," *id.* at 654, and "the publicly disclosed transactions involved do not raise . . . an inference of fraud." App. at 8A.[24]

The Eighth Circuit employed no language in its opinion to suggest some departure from the "clearly erroneous" standard for reviewing a district court's findings of fact. *Anderson v. City of Bessemer* is alive and well in the Eighth Circuit. The Eighth Circuit's decision does not, as Crane claims, undermine the "validity" of that decision, and there is thus no need for this Court to "restore" the unquestioned "validity" of that decision.

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[24] It is abundantly clear from the Eighth Circuit's opinion that the district court's decision could not withstand review even under the deferential, "clearly erroneous" standard. The "foremost" principle governing an appellate court's review under this standard is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson*, 470 U.S. at 573 (quoting *United States v. United States Gypsum*, 333 U.S. 364, 395 (1948)). That is exactly how the Eighth Circuit felt about this case: "we 'are confident in this case that the information put in the public domain . . . did not present so clear or substantial an indication of foul play as to qualify as either an allegation of fraud or a fraudulent transaction.'" App. at 8A (quoting *Springfield*, 14 F.3d at 656).

CONCLUSION

The Eighth Circuit's decision in this case does not conflict with the decisions of any other federal court of appeals. In fact, the Eighth Circuit explicitly adopted the reasoning and holding of the D.C. Circuit's decision in *Springfield*, notwithstanding Crane's unexplained criticism to the contrary.

In addition, the Eighth Circuit's decision does not question the applicability of a "clearly erroneous" standard of review to the findings of fact made by a district court. The district court in this case made no findings of fact to which the court of appeals could have applied that standard of review. Thus, the court of appeals did not even address itself to this non-issue, much less depart from the well-established case law of this Court and of the Eighth Circuit.

Accordingly, there is no question of law at issue that justifies the grant of a writ of certiorari in this case. Crane's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUN 13 1995
OFFICE OF THE CLERK

No. 94-1725

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Supreme Court of the United States

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CRANE CO.,
Petitioner,

v.

UNITED STATES OF AMERICA EX REL. STANLEY RABUSHKA
and STANLEY RABUSHKA,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent misstates some facts and ignores others to minimize the implications of the Eighth Circuit's erroneous interpretation of the False Claims Act's jurisdictional bar provision, 31 U.S.C. §3730(e)(4)(A). The most glaring omission in Respondent's brief (and the Eighth Circuit's opinion) and the single most important fact in considering whether jurisdiction exists over Respondent's False Claims Act suit is that the Pension Benefit Guaranty Corporation ("PBGC") began an investigation of Crane Co.'s publicly-disclosed actions before Respondent filed a suit under the False Claims Act based on the same conduct. The Eighth Circuit exacerbated its erroneous

interpretation of the False Claims Act ("FCA") by making a de novo review of the facts found and inferences drawn by the district court.

I. The Eighth Circuit's Interpretation Of §3730(e)(4)(A) Conflicts With Five Other Appellate Courts.

Only the Eighth, First[1], and Fourth[2] Circuits would allow a suit under the False Claims Act based on public disclosures that caused the government to investigate the alleged false claim. The Second[3], Third[4], Ninth[5], Tenth[6], and District of Columbia[7] Circuits would not. The majority view of the FCA's jurisdictional bar is that only true whistleblowers should be allowed to maintain an FCA action. *See, e.g., Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992).

In this case, the PBGC began investigating CF&I's underfunded pension liabilities based on public disclosures about the issue.

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[1] *United States ex rel. Prawer v. Fleet Bank*, 24 F.3d 320 (1st Cir. 1994) (*qui tam* suit not barred if it provides an appropriate return to the government).

[2] *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir.), *cert. denied*, 115 S.Ct. 316 (1994) (*qui tam* suit not barred unless it is derived from a previous disclosure).

[3] *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992)(*qui tam* suit barred when based on allegations disclosed during government investigation).

[4] *United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149 (3rd Cir. 1991)(law firm's *qui tam* suit barred when based on information gained in discovery).

[5] *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992)(*qui tam* suit barred if relator has no hand in the public disclosure of the allegations).

[6] *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 1364 (*qui tam* suit barred when based on allegations disclosed in civil suit, Senate hearings, and news reports).

[7] *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994).

The PBGC began its investigation before Respondent made his first claim of fraud. In his Dissent from the panel's opinion, Judge Magill notes the PBGC's investigation and the fact that it resulted from public disclosures.[8]

Respondent does not dispute those facts. Instead, Respondent attempts to hide from them by disingenuously arguing that Judge Magill relied on those facts in his Dissent without citing to evidence. The fact of the PBGC's investigation is established by the Affidavit of Stephen J. Segreto, an attorney for the Department of Justice, that was submitted both to the district court and the Eighth Circuit.[9] The same public disclosures that put the PBGC on inquiry notice of a possible fraud and caused it to investigate are the basis of Respondent's FCA suit.

This Court should clarify that the majority of the circuit courts of appeal are correct in interpreting §3730(e)(4)(A) to bar such parasitic suits.

II. The Court Of Appeal's Determination of Federal Subject Matter Jurisdiction By An Apparent De Novo Review Of The District Court's Findings Is Contrary to *Anderson v. City of Bessemer City*.

Respondent hopes to evade the mandate of *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) by ignoring the inferences from undisputed facts drawn by the Eighth Circuit that were directly contrary to the inferences drawn by the district court. When a district court chooses among disputed inferences from uncontradicted facts, its findings are entitled to review under the clearly erroneous standard. *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 291 (1960). *See also Sheehan v. Gustafson*, 967 F.2d 1214 (8th Cir. 1992).

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[8] Appendix at 30A.

[9] Stephen J. Segreto's affidavit was submitted to the Eighth Circuit in Appellee Crane Co.'s Appendix at A307-08.

The district court found that publicly-disclosed facts and circumstances were sufficient to put the government on inquiry notice of fraud. The district court also found that Respondent alleged substantially the same facts and circumstances in his complaint. Those findings of the district court are subject to the clearly erroneous standard of review.

Without discussion of the standard of review, the court of appeals second-guessed the district court's findings without ever making a determination that those findings were clearly erroneous. By doing so, the appellate court disregarded *Anderson v. City of Bessemer City*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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